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442862—57——1

In the Supreme Court of the United States

OCTOBER TERM, 1957

No.

THE UNITED STATES, PETITIONER

v.

CITIZENS UTILITIES COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Claims entered in the above cases on March 6, 1957.

OPINION BELOW

The opinion of the Court of Claims (App. B, *infra*, pp. 22–32) is not yet reported.

JURISDICTION

The Court of Claims granted summary judgment for respondents on March 6, 1957 (App. B, *infra*, p. 32), and timely petitions for rehearing by the United States and the third parties were denied on June 5, 1957 (App. B. *infra*, p. 32). By order of Mr. Justice Black, dated August 27, 1957, the time for filing a petition for a writ of certiorari

was extended to and including October 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether under Section 5 (b) of the Boulder Canyon Project Act holders of resale contracts for Hoover Dam electric energy temporarily unused by a prime purchaser are entitled as a matter of right to renewal of these contracts upon their expiration.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Boulder Canyon Project Act, 45 Stat. 1057 (43 U. S. C. 617, *et seq.*), and of the Regulations adopted pursuant thereto are set out in Appendix A, *infra,* pp. 18–22.

STATEMENT

The Boulder Canyon Project Act, *infra,* p. 18, in authorizing construction of the Hoover Dam, the largest of the federal public power projects, required the Secretary of Interior to provide by contract for revenue sufficient to assure the repayment within fifty years of the entire cost of the proposed dam (B. 16–17).[1] Accordingly, the Secretary of Interior in 1930 entered into contracts by which he sold 100 percent of the estimated firm energy or output of the Hoover Dam to the City of Los Angeles, the Southern

[1] References "B —" are to the bound volume which constitutes the Government's Exhibit 1 to its answer in these cases in the Court of Claims. This volume, which contains the complete text of all of the contracts involved herein is entitled "Boulder Canyon Project Final Reports, Part I—Introductory, Bulletin 2, Hoover Dam Power and Water Contracts and Related Data, the United States Department of Interior, Bureau of Reclamation."

California Edison Company and the Metropolitan Water District of Southern California, subject to optional allocations granted to the states of Arizona and Nevada and to certain municipalities in Southern California (B. 291, 323, 343, 351).[2]

By virtue of these contracts City and Edison were established as several lessees of the power facilities to be constructed as part of the proposed dam, with the obligation to generate power at cost (B. 291, 343). Water District was to use its share of this electrical energy for the sole purpose of pumping Colorado River water into and through an aqueduct which it planned to construct and place into operation in the immediate future (B. 323, 351). In view of the fact that at the time of the execution of its contract Water District's aqueduct was as yet unbuilt and its needs relatively uncertain, a supplementary contract with Water District (B. 354–355) authorized the Secretary of Interior to dispose of any energy not used by

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[2] This estimated firm energy finally was allocated as follows (B. 299–300, 325–326, 1115–1116):

1. Water District was obliged to take 36 percent of all firm energy.

2. City was obliged to take 13 percent.

3. Edison was obliged to take 9 percent (California Electric Power Company and others shared in a portion of this allotment).

4. Eighteen percent was allocated to the State of Arizona and 18 percent to the State of Nevada, but if neither could use such amount, and the Water District could not use it either, then the excess amount would be taken equally by City and Edison.

5. The remaining 6 percent was allocated to certain municipalities of Southern California with the stipulation that if such municipalities failed to contract for or use such amount, then City should take the residual amount.

Water District for the purpose allotted, and to credit the proceeds from such disposition to Water District's account. Before he could dispose of this energy to any outside purchaser, however, the Secretary was required to offer it on the same terms to City and Edison.

Early in 1937, shortly after the opening of the power facilities of the newly completed Hoover Dam, Citizens Utilities Company and Needles Gas and Electric Company (predecessor in interest to California-Pacific Utilities Company, hereinafter Cal-Pac) sought to obtain portions of the firm energy then unused by Water District under its contract (Exhs. 2, 3; R. 156–160). Negotiations were commenced and the details of the so-called "resale" contracts worked out between respondents and Water District (Exh. 9; R. 170–172), since the energy was being sold for Water District's account by the Secretary of Interior (Exhs. 2, 11, 12; R. 156–159, 174–178). The parties originally contemplated ten-year resale contracts, but Citizens decided subsequently that a ten-year period was too short to allow recovery of its entire investment in the transmission line which it would have to build from the dam to Kingman, Arizona, and requested a fifteen-year resale contract (Exh. 8; R. 170). Water District agreed to a fifteen-year contract (Exh. 9; R. 170–171), and Citizens then applied for and obtained permission from the Arizona Corporation Commission to write off the complete cost of this transmission line over the life of the contract (Exh. 31; R. 222–224).

Pursuant to the terms of Water District's 1930 contract, its unused firm energy was first offered to City

and Edison (Exhs. 13, 14, 15; R. 178–183) which raised no objection to the temporary resale of this energy since they did not desire to purchase it themselves at that time under the terms offered to respondents (Exhs. 16, 17, 18; R. 184–193). The resale contracts were then forwarded to Water District for its approval and submitted to the Secretary of Interior for formal execution (Exhs. 21, 27; R. 198, 209). Resale contracts bearing expiration dates of December 31, 1954, were formally executed with Citizens on January 7, 1938 (B. 657) and with Needles Gas and Electric on December 28, 1937 (B. 639).

Upon passage of the Boulder Canyon Project Adjustment Act (54 Stat. 774; B. 33), the Secretary of Interior in 1941 approved and promulgated "General Regulations for Generation and Sale of Power" in accordance with the new statute (B. 1129). Pursuant to these regulations and subsequent contracts, City and Edison became agents of the United States in the operation of the power facilities, and a new rate-making system for the sale of Hoover Dam energy was instituted which granted lower rates to the original allottees. By the terms of respondents' resale contracts, such benefits were also to be extended to them. Accordingly, new resale contracts were executed in 1941 between the United States and respondents, which superseded the original contracts and which by specific reference were made subject to all terms and provisions of the 1941 General Regulations referred to above (B. 985, 1001). In all other respects, the 1941 resale contracts were identical with respondents' ear-

lier contracts (R. 5, 35); both sets of contracts carried the same expiration date, December 31, 1954, the same annual maximum amounts of energy to which respondents were entitled, and the same minimum annual amounts which they guaranteed to purchase (B. 642, 645, 660, 663, 987, 991, 1003–1004, 1007).

The substantial remaining amount of surplus energy not bought by respondents was carried as a financial burden by Water District until May, 1942, when the wartime energy needs of a federally owned magnesium plant took up all of this surplus and a part of other allotments. The power supply contract of the defense plant was to expire on May 31, 1945, however (B. 933, 935), and Water District faced the possibility of a resumption of its financial burden. In order to forestall this possibility, Water District in 1945 requested the Secretary of Interior to resell all of its unused energy allotment for the entire life of its contract, which ran to 1987 (Exh. 30; R. 214). The Secretary of Interior thereupon offered all of Water District's unused energy until 1987 to City, Edison and California Electric Power Company, in accordance with the contracts of these parties and with the terms of Article 4 (b) (iv) of the 1941 Regulations, *infra*, p. 21, which provided that the Secretary could not dispose of Water District's surplus firm energy without first offering to the other original allottees the opportunity to contract for the energy on equal terms and conditions. City, Edison and California Electric accepted the offer, and by contract dated May 31, 1945, they purchased until 1987 all energy contracted for by Water District but

unused by it for pumping water into and through its aqueduct, subject to the respondents' rights to power under their resale contracts (R. 1061).

Some time prior to December 31, 1954, the expiration date of their resale contracts, respondents initiated attempts to have their resale contracts renewed (R. 6–7), claiming by virtue of Section 5 (b) of the Boulder Canyon Project Act, *infra*, p. 19, that they were entitled to renewal as a matter of right. Section 5 (b) provides, *inter alia*, that "[t]he holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations * * *." The Secretary of Interior refused to renew the contracts on the ground that the renewal rights guaranteed by Section 5 (b) applied only to the primary contracts for Hoover Dam power, not to resale contracts, and that, since all of Water District's unused firm energy had been sold by the 1945 contract, there was no firm energy available for resale to respondents (R. 7).

In December 1954, Citizens obtained a temporary restraining order from the United States District Court for the District of Arizona against termination of delivery of Hoover energy to the utility, but this order was dissolved in January 1955, and respondents then filed these suits in the Court of Claims (R. 9). In their petitions below they alleged the continued right to receive the energy covered by their now expired contracts, and sought recovery of the damages allegedly

resulting from the deprivation of this right.[3] The City of Los Angeles, Southern California Edison Company, California Electric Power Company, and the Metropolitan Water District of Southern California were brought in as third parties by the United States, and the two suits were consolidated for trial. Upon cross motions for summary judgment (R. 99, 225, 271), the Court of Claims granted respondents' motions and denied those of the United States, holding that respondents were entitled under Section 5 (b) of the Boulder Canyon Project Act, *infra*, p. 19, to renewals of their resale contracts, and ordering further proceedings to determine the extent of the damages which respondents had suffered from the failure of the United States to renew the contracts (R. 609–617).

REASONS FOR GRANTING THE WRIT

The Court of Claims, in holding that Section 5 (b) of the Boulder Canyon Project Act automatically entitled respondents to renewal of their resale contracts for electrical energy, has patently misconstrued the statute, and thereby thrown into confusion the admin-

[3] Respondents claimed as elements of damages (1) the amounts expended by them in constructing transmission lines from Hoover Dam to points of use, and (2) the amounts estimated to be the anticipated additional cost of replacing Hoover Dam power by other sources from December 31, 1954, the date of expiration of their resale contracts, to the 1987 expiration date of Water District's contract. In addition, Citizens sought to recover the cost of a transmission line not connected in any way with Hoover Dam, but which it claims to have begun building in reliance upon receiving a renewal of its resale contract. Cal-Pac's total claim of damages amounted to $4,579,807, and Citizen's to $12,216,775, making a total claim in both cases of $16,796,582. (R. 11–12, 38.)

istration of the Boulder Canyon Project at least through 1987. The fundamental importance of this issue to the orderly functioning of the nation's largest hydro-electric development warrants this Court's review.

1. Respondents' claims rest entirely upon the alleged application to their contracts of Section 5 (b) of the Boulder Canyon Project Act, which provides, *inter alia*, that

> The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations * * *.

The context and purpose of Section 5 (b) require that this provision apply only to the original allottees of Hoover Dam power, under which 100 percent of the project's firm energy was sold by the Department of Interior to parties other than respondents, and not to resale contracts for the disposition of surplus power not needed by an original allottee.

a. In formulating the basic plan for distribution of Hoover Dam energy, Congress set out in Section 5 of the Boulder Canyon Project Act specific provisions to be incorporated in the primary contracts for the sale of this power. These provisions were intended to insure return of invested capital, to protect the public interest in the proper distribution of the power, and to afford certain protections to the prime contractors themselves, in view of their undertaking to pay for specific amounts of Hoover Dam energy for a fifty-

year period and their substantial investments in transmission lines and other facilities in order to use this power. Thus, subsection (a) of Section 5 limited the duration of such contracts to fifty years, with a proviso for certain adjustments of contract rates after a specified number of years; subsection (b) made these contracts renewable upon expiration if the purchasers were not in default; subsection (c) directed the Secretary of Interior to contract only with certain responsible applicants, and instructed him to resolve conflicting claims in the public interest; and, finally, subsection (d) required larger contractors, upon timely notice, to share their transmission lines with smaller ones. Read, as of course it must be, in conjunction with the other provisions of Section 5, subsection 5 (b), in granting a right of renewal to the holder of "any contract for electrical energy," refers to these primary contracts contemplated by the Act.

That Congress intended the word "contract" in Section 5 (b) to have only this limited meaning is demonstrated by its consistent use of the word throughout the other portions of the section to describe only the primary contracts. Thus, Section 5 provides, in its general grant of authority, "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the * * * generation of electrical energy and delivery at the switchboard * * * upon charges that will provide revenue * * *." This provision alone establishes that the word "contract" as used in Section 5 (b) refers only to the primary contracts contemplated by the Act. And

this conclusion is fully borne out by the other subdivisions of Section 5: subsection (a) specifies that "[c]ontracts made pursuant to subdivision (a) of this section shall be made with a view of obtaining reasonable returns * * *;" and subsection (c) expressly declares that "[c]ontracts * * * for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. * * *" Thus, all of the language of Section 5 of the Act specifically refers to the contracts made by primary allottees.

b. Respondents' contracts formed no part of this integrated plan of mutual benefit and obligation between the United States and the primary purchasers of electrical energy. On the contrary, these contracts by their very terms were "resale" contracts, disposing of surplus energy for which Water District, a prime contractor, was obligated to pay, but for which it had no present need. Respondents' contracts were totally unlike the prime contracts under which the Secretary had already disposed of 100 percent of the dam's firm energy; they were of shorter duration, and expressly limited to the period during which Water District had said it did not need this energy, and they obligated respondents to take only a small proportion of the maximum amount of power to which they were entitled. Respondents, as "subcontractors" for this surplus energy, at no time assumed Water District's primary obligation to pay the United States for this energy. The authority for their contracts was de-

rived, not from Sections 4 and 5 of the Act, but rather from the terms of the prime contract between Water District and the United States, which, as stated above (*supra*, pp. 3–4), authorized the Secretary of the Interior to dispose temporarily of any firm energy not used by Water District for the operation of its aqueduct, and to credit the proceeds from such disposition to Water District's account.

Thus, in contracting with respondents, the Secretary of Interior was simply disposing of electrical energy which belonged to Water District. Although in the public interest he kept control of the ultimate disposition of this surplus power, there was no financial gain to the United States from its sale to respondents; regardless of the terms of these resale contracts, the United States would by virtue of the prime contracts receive payment for 100 percent of the dam's energy. The negotiations were carried on between respondents and Water District, the real parties in interest, and the final terms of the respondents' contracts were settled between these parties. Clearly, these resale contracts could not confer upon respondents the status of prime contractors with the United States entitled to the renewal provisions of Section 5 (b).

2. Moreover, at no time prior to respondents' applications for renewal did any of the parties concerned—respondents, Water District or the United States—consider that these temporary resale contracts would be entitled to the renewal privileges of Section 5 (b). On the contrary, respondents were at all times fully aware that they were subcontracting on a fifteen-year

basis for energy contracted for but temporarily not required by Water District. All of the correspondence relating to the negotiations for respondents' contracts made perfectly clear that only rights for this limited period were involved. Thus Citizens initially requested a fifteen-year contract because the proffered ten-year term was too short to recover its investment, and immediately after approval of the longer period by Water District, it applied for and received permission from the Arizona Corporation Commission to amortize the full cost of its transmission line over this fifteen-year period (*supra*, p. 4). The primary allottees, too, understood that this arrangement was only a temporary one. Neither Water District nor the other primary contractors intended to relinquish their right to any of Water District's energy beyond December 31, 1954, the expiration date of the resale contracts.

Respondents, of course, were completely aware of the preference rights of the other primary contractors to Water District's surplus energy, and since their contracts provided specifically for a fifteen-year term, they clearly could not have believed that they were obtaining *permanent* rights to this surplus energy in derogation of these outstanding preferences.

This understanding by the parties of the temporary nature of respondents' arrangement was expressly incorporated into the provisions of the resale contracts. Both of respondents' 1938 contracts make specific reference to Water District's prime contract with the United States (B. 641, 659, 660), and recite that each of

the respondents "has made application to the Secretary for the resale to it *for the term of this contract* of a part of the firm energy contracted for by the District, but which will not be required, *temporarily,* for pumping water into and in the aforesaid aqueduct * * *" (B. 641, 659; similar recitals appear in their 1941 contracts, B. 986, 1002). This language is in sharp contrast to that in the prime contracts with City, Edison and Water District, which contained specific contract renewal provisions repeating almost verbatim the wording of Section 5 (b) (B. 309, 336).

3. Finally, even if Section 5 (b) can be read to cover respondents' resale contracts, renewal of these agreements was properly refused. The right of renewal granted by the statute is expressly conditioned upon "such terms and conditions as may be authorized or required under the then existing laws and regulations * * *." The Secretary's Regulations of 1930 and 1941 recognize and incorporate the preference rights of Water District, City, Edison, and California Electric. Thus, Article 4 (b) (iv) of the Secretary's 1941 Regulations (App. A, *infra,* p. 21), currently in force, authorizes the disposition of Water District's surplus energy, "provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to [the other prime contractors] the opportunity to contract on equal terms and conditions * * *" for this energy. This Regulation was promulgated according to express statutory authority, and is incorporated by specific reference in

respondents' 1941 resale contracts. It furthers the statutory scheme already discussed, *supra,* pp. 9–10, by recognizing and protecting the contractual rights of the other prime contractors to first refusal of Water District's surplus energy, and is clearly a valid implementation of the purposes of the Act. Thus by both the express language of the Act and the terms of respondents' own contracts, any statutory rights respondents may have to renewal of their resale contracts are subject to the prior rights of City, Edison and California Electric as set out in the regulations. Only to the extent that these prime contractors do not choose to exercise their preferential rights can respondents have any claim at all to renewal of their resale contracts.

Far from waiving their preferential rights to Water District's surplus energy, however, City, Edison and California Electric have expressly exercised these rights. By the contract of May 31, 1945 (*supra,* p. 6) between these parties, Water District and the United States, City, Edison and California Electric, in accordance with their preference rights under Article 4 (b) (iv) of the 1941 Regulations, purchased all of Water District's surplus energy until 1987—the entire life of Water District's prime contract. And, while Article 5 of the 1945 contract specifically recognized that respondents had been sold a portion of this energy through 1954, as to which City and Edison had previously waived their preferential rights, it made no provision for further waiver of preference rights upon expiration of these short-term resale contracts.

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Whatever statutory renewal rights respondents possessed were thus legitimately extinguished by the execution of the 1945 contract, by which City, Edison and California Electric exercised their preference rights to the remainder of Water District's surplus energy. No statutory or contractual rights of respondents were violated by the Secretary's subsequent determination that their resale contracts could therefore not be renewed.[4]

4. The issue in this case is important. The carefully considered plan for the marketing of the electrical energy of the Boulder Canyon Project, with its complex network of mutual obligations and benefits, is disrupted by the erroneous decision of the Court of Claims. In clothing respondents' resale contracts with primary renewal rights, the decision below does violence to the intent and purpose of the statutory scheme, and creates extremely serious administrative problems. As a result of this decision, the Secretary of Interior cannot safely make any short-term interim arrangements for disposition of surplus energy, since such temporary contracts are now automatically clothed

[4] The opinion of the court below, in holding that respondents were entitled to renewal of their resale contracts, fails even to mention the 1941 Regulations, or to mention the decision in *California Electric Power Company* v. *United States*, 104 C. Cls. 289, 321, where the Court of Claims held that the Government was obliged to adhere to these very option provisions which the court now ignores.

with the statutory renewal rights which the Court of Claims has read into respondents' resale contracts. But to fail to make such arrangements may place an unnecessary burden on the primary allottees.

In these circumstances, the United States seeks review of the judgments below not merely because of the considerable sum of money which it may be required to pay—respondents seek almost seventeen million dollars in damages—but also because of the fundamental difficulties and uncertainties injected into the carefully developed plan for the operation of the vast Boulder Canyon Project. Since the case involves a sharp question of law, namely the meaning of Section 5 (b) of the Act, rather than of fact, it is an appropriate one for the grant of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
ROBERT S. GREEN,
Attorneys.

OCTOBER, 1957.

APPENDIX A

Section 5 of the Boulder Canyon Project Act of 1928, 43 U. S. C. 617d, 45 Stat. 1060, provides as follows:

> That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.
>
> After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.
>
> General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision

(b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to

meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from

engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

Article 4 (b) (iv) of the 1941 General Regulations for Generation and Sale of Power in Accordance with the Boulder Canyon Project Adjustment Act provides as follows:

(iv) In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it, then the Secretary shall dispose of such unused energy until required by the District, crediting on the District's obligation the proceeds of such disposition as received; provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to the City, the Company and The Nevada-California Electric Corporation the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for such energy, in the same proportion, and subject to the same rights with respect to proportions thereof not taken by others, as in the case of secondary energy. The rights

of the City, the Company and The Nevada-California Electric Corporation so to contract shall be deemed to have been waived unless, within 30 days after offer by the Secretary of such opportunity, such offer is accepted.

APPENDIX B

1. Opinion of the Court of Claims dated March 6, 1957:

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 6, 1957)

No. 364–55

CITIZENS UTILITIES COMPANY v. THE UNITED STATES

CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES

No. 381–55

CALIFORNIA-PACIFIC UTILITIES COMPANY v. THE UNITED STATES

CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES

Mr. Arthur S. Friedman, for the plaintiff in No. 364–55. *Messrs. Milton S. Gould, Ellis Lyons,* and *Gallop, Climenko & Gould* were on the briefs.

Mr. Ezekiel G. Stoddard, for the plaintiff in No. 381–55. *Messrs. Arnold M. Lerman* and *Cox, Langford, Stoddard & Cutler* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant. *Messrs. Francis J. Robinson* and *Gerson B. Kramer* were on the brief.

Mr. John H. Mathews for the City of Los Angeles. *Messrs. Roger Arnebergh, Gilmore Tillman*, and *Ely, McCarty and Duncan* were on the brief.

Mr. Edmund L. Jones for the Southern California Edison Company. *Messrs. Arthur J. Phelan, Paul R. Connolly, Bruce Renwick*, and *Harry W. Sturges, Jr.* were on the brief.

Mr. Edmund L. Jones for California Electric Power Company. *Messrs. Henry W. Coil* and *Donald J. Carman* were on the brief.

Mr. James H. Howard for The Metropolitan Water District of Southern California. *Messrs. Donald M. Keith* and *John W. Dickey* were on the brief.

ON DEFENDANT'S AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiffs sue the United States for damages because the United States refused to renew their contracts for electrical energy produced at the Hoover Dam on the Colorado River. The two suits have been consolidated since they involve the same issues. The four "third parties" were brought into the case on notices, requested by the United States and issued by the court pursuant to its Rule 19. The facts in the cases appear from undisputed documents, and the cases are suitable for decision on motion for summary judgment.

The Boulder Canyon Project Act, 45 Stat. 1057, enacted in 1928, authorized the construction and operation of Boulder Canyon Dam and related facilities.

But the Act required that, before any appropriations were made or any construction was commenced, the Secretary of the Interior should obtain contracts which would bring the United States enough revenue to repay it, with interest, within 50 years, the money proposed to be advanced by the United States for the construction of the dam, together with all expenses of operation and maintenance. The Secretary on April 26, 1930, entered into a contract with the City of Los Angeles and Southern California Edison Company, Ltd., hereinafter called, respectively, City and Edison, which are two of the third parties in this suit. Under this contract City and Edison were made, severally, lessees of parts of the proposed dam and the power plant machinery, their two parts constituting the whole, and they were obligated to generate, at cost, electrical energy for themselves and for others with whom contracts would be made. City and Edison also agreed to be responsible for paying for 64 percent of the energy produced at the dam, subject, however, to the rights of the States of Arizona and Nevada to take large amounts of this 64 percent allotment when and if they so desired, and subject to the rights of several municipalities in Southern California to take 6 percent of this allotment if they made contracts to do so within a specified time. The allotments of City and Edison, amounting in all to 64 percent, were several, but the detailed percentages of their obligations are not relevant here. But they were obliged, between them, to take and/or pay for all of the 64 percent if no other entity exercised its option to take a part of it.

The Secretary of the Interior reported to Congress that the City-Edison contract was sufficient by itself to provide revenues to pay for the project.

On April 26, 1930, the date of the City-Edison contract, the Secretary also made a contract with the

Metropolitan Water District of Southern California, herein called Water District. It is one of the third parties in these suits. Water District was obligated, by its contract, to take and/or pay for 36 percent of the energy generated at the dam. Water District wanted the energy to pump Colorado River water into the aqueduct which it proposed to build from the dam to the City of Los Angeles. City and Edison wanted to be certain that Water District did not use any of the energy which it bought to compete with them in the electrical utility business in their areas. The Secretary therefore inserted in Water District's contract a provision that it could use the energy only for pumping water into its proposed aqueduct. That restriction created the possibility that Water District might have to pay for a lot of energy that it could not use. Water District's contract provided, in that regard, that the Secretary might dispose of Water District's unused energy by first offering it to City and Edison and, if they did not buy it, selling it to others.

The municipalities in California which had options to take, in all, 6 percent of City's allotment exercised their options within the time specified, and the Secretary executed contracts with them in 1931. In 1936, before the dam was completed, the State of Nevada chose to take a part of the 18 percent on which it had an option, and the Secretary made a contract with it.

Water District's obligation to begin to take and/or pay for its 36 percent was to become effective when two billion kilowatt hours of energy per annum became available. When that time approached in 1937, Water District advised the Secretary that there would be surplus energy available for resale and that that condition would exist until the end of 1954. The Secretary advised City and Edison that the surplus energy was available, but they did not exercise their

options to take it. The plaintiffs negotiated with the Secretary and with Water District, which would be the beneficiary of the resale contracts if made. Ten-year contracts were at first considered, but the plaintiff Citizens thought this was too short a period for it to recover the investment which it would have to make in building a transmission line from the dam to Kingman, Arizona, in order to use the power from the dam. It was then decided that the contracts should run to December 31, 1954, and they were so written. The contracts bound the plaintiffs to take and pay for only a small proportion of the energy which they had the right to take and pay for at their option.

The parties proceeded according to the contracts, and the plaintiffs received the part that they were entitled to, and chose to take, of Water District's surplus. On May 31, 1945, the Secretary made a contract with City and Edison, among others, which, the defendant says, conveyed to those contractors all of Water District's unused energy, including that which the plaintiffs were getting under their contracts, but, as to that latter amount, the sale not becoming effective until the end of the plaintiffs' contracts on December 31, 1954.

The plaintiffs, when the termination dates of their contracts approached, applied to the Secretary for renewals of their contracts. These applications were rejected, and the plaintiffs have received no electrical energy under their contracts since shortly after the date of expiration of their contracts. They claim to have been heavily damaged by the Secretary's refusal to renew their contracts, and sue here for those damages. They base their claim upon section 5 (b) of the Boulder Canyon Project Act which says:

> The holder of any contract for electrical energy not in default thereunder shall be en-

> titled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

The plaintiffs say, correctly, that they were the holders of contracts for electrical energy, and were not in default under their contracts. Therefore, they say, the statute applied to them. The Government says that the plaintiffs read the statute too literally, and thereby miss its meaning. The Government says that the statute intended to grant the renewal privilege only to those who, in effect, underwrote the project, by binding themselves to take and/or pay for electricity from the project at a time when such promises were a condition precedent to the appropriation of money for and the building of the project. It says that entities like the plaintiffs, who made contracts only for surplus energy available for resale, and whose contracts were for relatively short periods, were not intended to be covered by the renewal provision.

The plaintiffs find flaws in the Government's "underwriters" argument. They point out that although Water District made its contract, on the same day that City and Edison made theirs, to take and/or pay for 36 percent of the energy produced, Water District at that time was a new corporation, not yet financed, and the Secretary, in reporting to Congress that sufficient revenues were assured by contracts, did not include Water District's contract as an asset. They point out that the several municipalities in Southern

California which had what were, in effect, options to take a part of the energy contracted for by City, were not underwriters of the project, because before they made their contracts, City had already obligated itself to pay for the energy which they later contracted for. Yet their contracts, when made, contained express renewal provisions. The same seems to have been true of contracts later made by the Secretary with the States of Arizona and Nevada.

If there is any valid distinction between the contracts of the plaintiffs and those of other entities whose contracts did give them renewal rights, it would seem to be that the plaintiffs' contracts covered only surplus energy, disposed of by the Secretary because the one who had contracted to pay for it had no use for it. Is this difference sufficient to deprive these contracts of the renewal privilege written into section 5 (b) of the Project Act?

The plaintiffs' contracts contained no provision for renewal. When Water District advised the Secretary that it would have surplus energy for disposal, it said that that would be true until the end of 1954. When the plaintiffs applied to the Secretary in 1937 for some of this surplus, they apparently had no thought of any right of renewal. They say, and apparently correctly, that the information which they had, indicated that the subject matter of their proposed contracts, i. e., surplus energy in Water District's allotment, would not exist after 1954. If the failure of the plaintiffs to insist on, or even think about, a right of renewal were urged, which it is not, as a waiver of their statutory rights under section 5 (b), the circumstances might well rebut any inference of an intent to waive.

By the year 1945, Water District had apparently decided that it would have surplus energy for all the rest of the term of its 50-year contract. The situation

was acute at that time because a defense plant which had been taking and paying for a large amount of Water District's surplus energy, had closed down. By that time, City and Edison were willing to agree to take Water District's surplus energy, which they had not been willing to do in 1937. So the 1945 contract was made. As we have said, the Government says that that contract intended to include, after 1954, the energy that the plaintiffs had been getting. The plaintiffs say that the 1945 contract did not include the energy which they would continue to be entitled to if their contracts were renewed.

The question of what was intended by the 1945 contract has caused great concern to the Government, of course, since if it did include the energy which the plaintiffs had been getting, and if the plaintiffs had a statutory right to renewal, the Government was in the position of having sold the same thing to different parties. But we think that the intention of the Government and the third parties, when they made the 1945 contract, is not conclusive, and indeed is scarcely relevant, so far as the plaintiffs are concerned. We do not, therefore, undertake to determine the intent of the 1945 contract. We note that the Government's officials had great difficulty in making up their minds as to its intent.

The plaintiffs say that the only authority which the Secretary had for the sale of electrical energy was given him in section 5 of the Project Act; that section 5 says that in making contracts for the sale of energy, section 5 (b) *inter alia*, shall govern; that section 5 (b) is the renewal privilege section; that in several places in the plaintiffs' contracts there were statements that the contracts were made pursuant to the Project Act. They urge, therefore, that they are entitled to the benefits of the statute. They further say that the

equity of the statute providing for the renewal privilege makes it applicable to them. It was intended to protect those who had invested in facilities to use or distribute electricity from the dam, and customers who had become dependent upon the continued flow of that electricity. The plaintiffs say, and it would seem to be true, that these facts existed in their situations.

The Government points to the fact that the plaintiff Citizens represented to the Arizona Corporation Commission that it should be allowed to write off its investment in facilities to transmit energy from the dam during the 15-year period of its contract, and says that this shows that that plaintiff did not count on a renewal privilege. We have already discussed the reasons why the plaintiffs may not have thought that there would be a renewal of their contracts.

The applications of the plaintiffs for renewal were rejected by the Secretary in 1952. They persisted in their applications, and on March 2, 1954, the Secretary offered them, in writing, extensions of their contracts to May 31, 1987. They accepted these offers in writing, but the Secretary ultimately refused to execute formal documents of renewal, and they have received no electrical energy since early in 1955. The plaintiff Citizens bases its claim, in the alternative, upon the renewal of its contract which, it says, was accomplished by the correspondence just referred to. In view of our conclusion upon the whole case, we do not decide this question.

The Government argues that the Secretary, in his dealings with the plaintiffs, was not acting for the United States, but for Water District. It is true that the primary benefit of the sale of Water District's unused energy inured to Water District, because the price received for it was credited to Water District's account. The contract with Water District might have provided that it could market its own unused energy,

so long as it did not send it to the area where it would compete with City and Edison. But the Government did not choose to have other persons selling Hoover Dam power at wholesale. Its contract with Water District carefully provided that the Government, through the Secretary, would be the one to do the selling, if it was done. The Secretary was not acting as an agent of Water District. He was acting for the United States, and was carrying out its policy of keeping the sale of power under its control. He was also furthering the interest of the United States in keeping Water District from being overwhelmed by its obligation to pay for power for which it had no use, and thereby, possibly, being disabled from carrying out its contract with the United States.

There is an apparent inconsistency in the position of the plaintiffs, in that they do not claim that their rights, under their renewals, would be as extensive as their rights under their original contracts. It will be remembered that their contracts gave them what were, in effect, options to take specified amounts of electricity, but only bound them to take and pay for much smaller amounts. Water District was willing, in 1937, to permit the Secretary to so contract because it was certain that there would be sufficient surpluses, until the end of 1954, to satisfy those contracts. But the contracts certainly contemplated that if Water District had no surplus after 1954, there would be nothing to sell as surplus to anyone. And they certainly would have contemplated, if it had occurred to the parties, that no extension of the contracts should deprive Water District of electricity which it needed for its own purposes. The plaintiffs claim only the rights to renewals which would have given them such electricity, if any, as was surplus to Water District's needs after 1954, and was within the amounts set in their original contracts.

Our conclusion is that the plaintiffs were entitled, under the statute, to renewals of their contracts with the limitations which they concede, and that the Government violated their statutory rights when it denied them renewals and refused to give them the electrical energy to which renewals of their contracts would have entitled them.

The plaintiffs are entitled to recover, and judgment will be entered to that effect. The amounts of the judgments will be determined in further proceedings under Rule 38 (c).

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

2. Order Overruling Motions for Rehearing:

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this fifth day of June, 1957, that said motions be and the same are overruled as follows:

* * * * * * *

364–55 Citizens Utilities Company

381–55 California-Pacific Utilities Company

Defendant's motion and the motions by the third parties, City of Los Angeles and The Metropolitan Water District of Southern California.

BY THE COURT

/s/ Marvin Jones

MARVIN JONES

Chief Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 527

THE UNITED STATES,
Petitioner,

vs.

CITIZENS UTILITIES COMPANY, *et ano,*
Respondent.

No. 528

THE CITY OF LOS ANGELES,
Petitioner,

vs.

CITIZENS UTILITIES COMPANY, *et ano,*
Respondents.

ON PETITIONS BY THE UNITED STATES (No. 527) AND THE CITY OF LOS ANGELES (No. 528) FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF OF CITIZENS UTILITIES COMPANY IN OPPOSITION

JESSE CLIMENKO
Attorney for Citizens Utilities Company
30 Broad Street
New York 4, N. Y.

GALLOP, CLIMENKO AND GOULD
MILTON S. GOULD AND ARTHUR S. FRIEDMAN
30 Broad Street
New York 4, N. Y.
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

THE UNITED STATES, *Petitioner,* *vs.* CITIZENS UTILITIES COMPANY, *et ano, Respondent.*	No. 527
THE CITY OF LOS ANGELES, *Petitioner,* *vs.* CITIZENS UTILITIES COMPANY, *et ano, Respondents.*	No. 528

ON PETITIONS BY THE UNITED STATES (No. 527) AND THE CITY OF LOS ANGELES (No. 528) FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF OF CITIZENS UTILITIES COMPANY IN OPPOSITION

Citizens Utilities Company files this Brief in opposition to the Petitions of the United States (Defendant below) and the City of Los Angeles (a Third Party below) for Writs of Certiorari to the United States Court of Claims.

OPINION BELOW

The Opinion of the Court of Claims (United States App. B, pp. 22-32) is reported at 149 Federal Supplement, page 158.

JURISDICTION

On March 6, 1957, in response to cross-motions of all parties for summary judgment solely on the issue of liability, the Court of Claims unanimously granted summary judgment to Respondents (United States App. B, p. 32). On June 5, 1957 Petitioners' applications for rehearing were unanimously denied (United States App. B, p. 32).

QUESTION PRESENTED

Whether an alleged statutory purpose, not stated in the Statute, barred Respondent, the holder of a contract with the United States for electrical energy from Hoover Dam, from renewal of its contract under the plain mandate of Section 5(b) of the Boulder Canyon Project Act, which provides that "The holder of any contract for electrical energy * * * shall be entitled to a renewal thereof * * *."

STATUTE AND REGULATIONS INVOLVED

The United States' Petition significantly omits reference to Section 4(b) of the Boulder Canyon Project Act, 45 Stat. 1058 (43 U. S. C. 617c). (App. A, *infra*, p. 1a). That Petition also fails to set forth the original so-called preference Regulation (City App. A, pp. 4a-12a). Both Petitions set forth only part of the pertinent text of the alleged preference Article of the Secretary of the Interior's 1941 Regulations. (United States App. A, pp. 21-22; City App. A, p. 13a). Additional material portions of that Article are contained in Appendix A, *infra*, pp. 2a-5a.

STATEMENT

The efforts by Petitioners to devise an issue appropriate for the Court's consideration result in distortion of the "Statements" in many crucial respects, by reason of the omission therefrom of certain important facts. Such omissions are supplied below.

Respondent entered into its original contract with the United States on January 7, 1938 (B. 657-673).[1] It provided for the delivery to Respondent of certain quantities of electrical energy from Hoover Dam until December 31, 1954. This energy had originally been a part of a larger block of energy sold by the United States to Metropolitan Water District of Southern California, a Third Party below (B. 323, 351). When Water District, bound by its contract to pay for all of its energy, concluded that until January 1, 1955 it would be unable to use a part of that energy for the only purpose for which it could be lawfully used, it sought relief from the United States. The result was the sale to Respondent.

Prior to December 31, 1954 it was finally and conclusively determined by Water District that, contrary to earlier estimates, it would not require for its own use the energy sold to Respondent until May 31, 1987—the expiration date of its own contract with the United States. When that fact became known, Respondent applied to the Secretary of the Interior for renewal of its contract.

---

[1]References "B—" are to the volume which constituted United States' Exhibit I in its Answer filed in the Court below. This volume, which contains the complete text of the contracts involved herein, and certain of the Regulations, is entitled "Boulder Canyon Project Final Reports—Part I—Introductory, Bulletin 2, Hoover Dam Power and Water Contracts and Related Data, the United States Department of Interior, Bureau of Reclamation."

On March 2, 1954 the Secretary formally communicated to Respondent his decision to grant renewal (App. B, *infra*, p. 6a). Respondent immediately communicated to the Secretary its acceptance of the offer of renewal (App. B. *infra*, p. 12a). The Secretary's decision and offer to renew were avowedly based upon an Opinion of his Solicitor's office, copies of which accompanied his communication (App. B, *infra*, pp. 7a-11a).

Despite the fact that the Third Parties, together with Water District, had, prior to March 2, 1954, fully communicated to the Secretary of Interior their reasons for opposition to Respondent's renewal right, they nevertheless persisted in their efforts to deprive Respondent of its source of energy.

Simultaneous with the Secretary's offer of renewal in March, 1954, instructions had been issued by him for the preparation of a formal document of renewal (R. 349). Although that document was prepared by officials of the Department of the Interior (R. 344), it was never executed. On March 2, the Secretary had firmly stated his intention to renew; by September 1, he was equivocating (App. B, *infra*, pp. 14a-17a). Finally, on December 2, 1954 he repudiated his commitment (App. B, *infra*, p. 13a). That repudiation, less than one month before the expiration date of Respondent's original contract, was solely the result of an urgent communication to the Department by regional officials of the Bureau of Reclamation, who adverted in their communication to the precarious position of Respondent and its consumers who did not know at that late date whether the Secretary would honor his renewal agreement or repudiate it (App. B, *infra*, pp. 18a-22a).

After January, 1955, Respondent received no further electrical energy from Hoover Dam. But that energy was not returned to Water District. Water District did not want it for its own use and therefore could not lawfully

receive it. The energy was thereafter delivered by the United States to the City, to Southern California Edison Company, and to California Electric Power Company. Respondent's distribution system, almost literally in the shadow of Hoover Dam, was cut off from any energy from that source.

ARGUMENT

1. Section 5(b) of the Boulder Canyon Project Act conferred a right of renewal on the holder of "any contract" for electrical energy. That section, on its face, conferred a right of renewal upon Respondent. The Court of Claims said (United States App. B., p. 27):

> "The plaintiffs say, correctly, that they were the holders of contracts for electrical energy, and were not in default under their contracts."

It labors the obvious to say that the word "any" means "each and every" in the context of the Statute. The use of the word "any" plainly embraced *all* contracts for Hoover Dam electrical energy, without exception. Respondent's contracts specifically recited that they were made *pursuant* to the provisions of the Boulder Canyon Project and Boulder Canyon Project Adjustment Acts (B. pp. 657-658, 1001-1002). In various places in the contracts, Respondent was expressly denominated a "contractor for energy" (B. pp. 1003, 1005). The same designation was applied to other contractors, including the Third Parties below (B. pp. 836, 862).

Petitioners have never seriously argued that the language of Section 5(b) of the Statute did not, on its face, apply to Respondents. They have relied, and rely here, on the contention that the "purpose" of the Act requires that the language be given a meaning different from what

it says. This position is stated at page 9 of the United States' Petition:

> "The *context* and *purpose* of Section 5(b) requires that this provision [for renewal] apply only to the original allottees of Hoover Dam power * * *." (emphasis supplied).

Basically, Petitioners' claim is that the renewal rights extend *only* to those organizations whose contracts *originally* guaranteed payment of the cost and operation of the project, i.e., those contracts which originally preempted 100% of the firm energy to be generated by the project. The United States is at pains in its Petition, in further support of this argument, to refer to other places in Section 5 of the Act where the word "contract" appears in an attempt to demonstrate that the word "contract" in those places has a meaning limiting it to "primary allottees" (United States Petition, pp. 10-11).

This argument is basically wrong because: first, it is an incorrect analysis of the meaning of the word "contract" and this is demonstrable by reference to another section of the Act; second, even if it had the meaning urged by Petitioners, that limited meaning is at variance with the fact that entities which plainly would not come within it have concededly been granted rights of renewal in frank conformity with what is otherwise the plain meaning of the renewal section.

The United States makes no reference to Section 4(b) of the Statute in its argument about the meaning of the word "contract". That Section (App. A, *infra*, p. 1a) provides that before any money is appropriated for the construction of the dam and power plant, the Secretary of the Interior "shall make provision for revenues *by contract*" adequate in his judgment to secure payment of all expenses of operation and maintenance and repayment within fifty years of all amounts advanced by the United States.

Obviously, these are the same "contracts" as are referred to in Section 5. Just as plainly, alleged "underwriters" were those entities which had made contracts in accordance with Section 4(b) and had thereby provided the foundational requisites which enabled the Secretary of the Interior to commence construction of the project. Necessarily, according to Petitioners' argument, these entities must be the only ones with renewal rights under the Statute. The difficulty is, however, that this is not the case. By that standard there are only two entities, i.e., the City of Los Angeles and the Southern California Edison Company which would be entitled to rights of renewal.

On June 9, 1930 the Attorney General of the United States gave an Opinion to the President on the question whether two contracts with the City of Los Angeles and the Southern California Edison Company, which together guaranteed payment for 64% of the firm energy to be generated at the Hoover Dam, would fulfill the requirements of Section 4(b) of the Act (B. p. 1252 *et seq.*).

Relying only on the contracts between the United States and the City of Los Angeles and the Southern California Edison Company, the Attorney General held that the requirements of Section 4(b) had been met by securing those two contracts. Water District's contract, for 36% of the firm energy, was totally ignored in determining whether there had been compliance with the so-called "underwriter" section of the Statute. The Comptroller General confirmed this on October 10, 1930 (B. p. 1255 *et seq.*). It was further confirmed in various hearings before Committees of the Senate (R. 292).

Yet, Water District has an undisputed right of renewal under the Statute. Indeed, that right of renewal has been reaffirmed in this very case. It follows, therefore, that the right of renewal conferred upon Water District obviously did not result from its status as a so-called "underwriter".

It was not such an "underwriter". Its right of renewal was recognized because the Act says that the holder of "any" contract for electrical energy is entitled to renewal rights.

This is but the first obvious flaw in Petitioners' argument. Even more strikingly demonstrative of its invalidity is the fact that the City of Burbank, the City of Glendale, the City of Pasadena, the Southern Sierras Power Company and the Los Angeles Gas and Electric Corporation all obtained contracts including renewal rights (B. 405, 423, 443, 461, 479). Those contracts were entered into *after* it had been determined that adequate provision had already been made to reimburse the United States for the cost of the project. These contracts were entered into after *100%* of the firm energy of the project had already been contracted for on a guaranteed basis by City, Edison and later, Water District (B. 291, 323). In fact, the allocations to these entities all came from *within* the allocations which the City and the Edison Company had already undertaken in their contracts with the United States. If any or all of the named municipalities or private power companies had declined for any reason to contract for allocations of energy, the City and Edison under their contracts were already obligated to take and or pay for such allocations. How then can it be said these contractors were "original allottees", "primary allottees" or "underwriters", exclusively entitled to the benefits of renewal? Plainly, they were not. Their rights of renewal, which are contained in their respective contracts and are reaffirmed by the United States in this case, were obtained from the clear mandate of Section 5(b) of the Act, and from no other source. The same holds true for the States, whose contracts were not executed until after the passage of the Adjustment Act. Yet the States have rights of renewal (B. 1107)

Since Petitioners' only real argument against application of the plain meaning of the language of Section 5(b) is so obviously without substance, we submit that the Court of Claims was correct in its holding that the United States was liable to Respondent for failure to honor its statutory right of renewal.

2. After the rendition of Judgment on March 6, 1957, Petitioners and the remaining third parties moved for reargument below (R. 619, 641, 661, 671, 685). The belated premise of that motion was that the language of Section 5(b) of the Act required an incorporation of Article 4(b)(iv) of the Secretary's 1941 Regulations. Petitioners contended that those words of Section 5(b) which called for renewal "upon such terms and conditions as may be authorized or required under then existing laws and regulations" exempted the United States from liability because those words made the renewal right subject, as of January 1, 1955, to the alleged Regulation preference rights in the third parties. While movants below conceded that the Secretary's Regulations could subject the renewal right only to "reasonable limitation" and not to "complete negation," nevertheless, it was and is contended that the Regulations rendered the United States "without responsibility" (R. 627, 628).

In truth, Petitioners' would have had the Court below construe Section 5(b) as if it read:

> "The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof *if* such renewal be authorized or required under existing laws and regulations * * *" (Emphasis supplied).

Petitioners' argument, notwithstanding, Section 5(b) does not so read, and cannot properly be so construed. Congress did not say that renewal shall take place "if". Congress said that renewal shall take place and that the

terms and conditions to be included in the renewal, such as rates for energy (B. 1135), charges for generation (B. 1142), provision for adjustment of rates (B. 1138), terms for settlement of disputes (B. 1146), and procedures in the event of default (B. 1146), to mention a few, shall be such as are provided in those Regulations.

It is absurd to suggest that a basic right such as renewal, deliberately conferred by Congress in plain language, was intended to be subjected to complete destruction by Regulations of the Secretary at any time.

Besides this defect in Petitioners' argument, there is one additional fact which completely destroys it. As of December 31, 1954 there were no preference Regulations in existence relating to Water District's basic allocation of firm energy (from which Respondent's energy came). That alleged preference right had been eliminated from the Regulations, since the reason for its existence had disappeared (United States App. B. p. 25).

The original statement of alleged preference rights was in Article V of the Secretary's 1930 Regulations (B. 1119). These were revised by the Secretary's 1941 Regulations (B. 1131). It is claimed that the 1941 Regulations, in Article 4, repromulgate the preference rights.

Article 4 of the 1941 Regulations is entitled "ALLOCATION OF ENERGY." Section (a) of that Article is entitled "Firm energy." There are set forth in that section the allocations of firm energy (including that of Water District, of 35.2517%). This Section of Article 4, dealing as it does with Water District's allocation of firm energy, a portion of which allocation is the very and only energy involved in this case, contains no provision for any preference rights. This is indisputable. (App. A, *infra*, pp. 2a-3a)

Section (b) of Article 4 (App. A; *infra*, pp. 3a-5a) is the section on which Petitioners rely to establish the so-called preference rights. That section is entitled "Procedure respecting *States*' allocation" (emphasis supplied).

Section (b) deals first with what happens if either the States of Arizona or Nevada should fail to take their full allocations of energy. Obviously, this has no reference to the energy here in question. The Section continues to make provision in the event that firm energy allocated to the States, the City of Los Angeles, the Edison Company and the California Electric Power Company is not being used by those entities (B. 1132). Obviously that provision has no pertinence to the energy here in question. It is then provided that so much energy allocated to the States and not contracted for by them and not in use by them or Water District shall be taken and paid for in stipulated percentages by the City, Edison Company and California Electric. Nevertheless, "*Such energy* shall be released *to* the District" (emphasis supplied) by the said parties in certain ratios under certain contingencies. There follow four subdivisions relating to the energy defined above, the last of which, (subdivision (iv)), is asserted to be the third parties' preference rights to Respondent's energy.

Entirely aside from the content of the four sub-divisions, it is to be noted that they are all specifically limited by their introduction to a release of energy *to* the District (and not *by* it) *by* the third parties (and not *to* them). "Such energy" as is to be released *to* the District is the same energy described in the sentence next preceding, i.e. "So much of the energy allocated to the States * * *." Therefore the four sub-divisions which follow can have nothing whatever to do with District's own basic allocation of firm energy (and therefore, with Respondent's energy) which is dealt with in Section (a) of Article 4.

"Sub-division" (iv) of Section (b) states:

> "In the event the District shall fail for any reason to use all or any of the firm energy *herein* allotted to it * * *" (emphasis supplied).

The very wording of sub-division (iv), the so-called preference right, refers to a failure by Water District to

use the energy allotted to it "herein". Respondents' energy was not energy allotted originally to Water District "herein", i.e., in Section (b) of Article 4. Respondents' energy derived only from Water District's original allocation, which is provided for in Section (a) of Article 4.

The fact that alleged preference rights, supposedly contained in the original Regulations did not survive in the 1941 Regulations, is not surprising. By 1941, Water District had constructed its aqueduct and therefore was in a position for all time to utilize Hoover energy for the only purpose for which such energy was allotted to it, i.e., to pump water. The basic rationale for the existence of alleged preference rights, in the first instance, had ceased to exist. All reason for alleged preference rights to Water District's original allocation of firm energy having terminated, the alleged preference rights themselves were eliminated. In their place came alleged preference rights, if such they be, to an entirely different and unrelated block of energy. However that may be, alleged preference rights to energy which came *to* Water District from original allocations of other parties, as contrasted with the block which was the source of Plaintiffs' energy (Water District's own original allocation) have no pertinency to this case.

3. The Court of Claims Opinion considered and decided Respondent's right to renewal under the Statute. In view of that determination, the Court below expressly did not adjudicate several additional and alternative claims of Respondent. (United States, App. B. p. 29)

Respondent claimed below that irrespective of its statutory right to renewal it was entitled to damages for breach by the United States of the contract formed by the Secretary's offer of March 2, 1954 and Respondent's acceptance of March 16, 1954. It was Respondent's claim that the fact that the parties contemplated that a formal written embodiment was to follow was of no consequence where no matter

within the contemplation of the parties was open to further negotiation. (*American Smelting and Refining Co.* v. *United States* 259 U. S. 75, 79 (1922); *United States* v. *Purcell Envelope Co.*, 249 U. S. 313 (1919).) In opposition to Respondent's alternative claim, Petitioners advanced two arguments. The first was that the United States could not be liable for failure to perform under its contract of renewal because it had no authority to enter into such contract of renewal. This was based on the assertion that in May 1945, (B. 1061) the energy then allocated to Respondent was, for the period after December 31, 1954, sold by the United States to the third parties. In reply to this assertion, Respondent showed, first, that the 1945 contract in question, which was stimulated by circumstances having nothing to do with Respondent's energy, did not in fact purport to sell that energy for the period after December 31, 1954. Therefore, it was Respondent's position that, statutory right of renewal aside, there was no lack of authority on the Secretary's part to make his contract of renewal for the period commencing January 1, 1955. It was also shown that the parties to the 1945 contract, by means of charts of estimated available energy for sale, had definitely not included Respondent's allocation as a block of energy which was then available for disposal in that contract. (R. 305, 306).

Second, Petitioners claimed below that the Secretary was unauthorized to make his renewal contract because the Secretary's preference Regulation required that he give first option to the energy to the third parties. In reply to this argument Respondent showed that the preference rights claimed by the Third Parties had been waived in 1938 and that such waiver was required by the Regulations to be effective *until* such time as Water District required the return of the energy for its own use (B. 659, R. 309, 310, 313, 314).

Finally, it was contended by Respondent that it had justifiably relied upon the Secretary's renewal to its detriment and that this circumstance rendered the United States liable for the ultimate repudiation of this agreement.

4. Petitioners contend that the Decision below is of far-reaching consequence with respect to the administration of Hoover Dam. Significantly, there is not one statement of any particular respect in which such effect is anticipated. The City of Los Angeles erroneously argues that the Court below has directed a renewal (City Petition, p. 15) and such renewal entails expense to the United States for facilities and the like (City Petition, p. 14). The Decision below did no such thing. It merely established the liability of the United States for damages. Even if the case had been one for specific performance it is plain that no expense would have been imposed on the United States for resumption of the supply of energy to Respondent.

Furthermore, the state of affairs with respect to contracts for Hoover energy is such that this question does not affect any contractor for energy other than Respondents, and it is almost impossible that it would ever recur, particularly in view of the fact that all contractors, far from having surplus energy for disposal, are in fact competing for additional allocations, as indeed this case plainly demonstrates.

In what can only be at this time a disingenuous attempt to suggest to this Court that the Decision below has consequences so cataclysmic to orderly administration as to impel this Court's attention, Petitioner says (United States Petition, pp. 16-17):

> "As a result of this decision, the Secretary of Interior cannot safely make any short-term interim arrangements for disposition of surplus en[illegible]

since such temporary contracts are now automatically clothed with the statutory renewal rights which the Court of Claims has read into respondents' resale contracts."

But this is patently specious.

The only effect of the Decision of the Court below is to hold that a disposition of any part of a contractor's allocation of energy shall *continue* to be effective until that contractor once more requires the energy for its own use. This is exactly what is recited in the third "Whereas" clause of Respondent's contract (R. 1002). Parties other than the original contractor for the energy in question and the party which receives the energy disposed of, can have no complaint about this arrangement. Such third parties would not under any circumstances be entitled to participate in the use of that energy had the original contractor not relinquished it; and, to the extent that alleged preference rights exist in third parties to an *original* redisposition of energy (See: *California Electric Power Company* v. *United States*, 104 C. Cls. 289), they are amply able to protect themselves by exercising their preference rights at the time of the original redisposition.

Contrary to Petitioners' somewhat irresponsible appraisals of the effect of the Decision below, which try to depict it as granting Respondent rights permanently superior to those of Water District, the Decision does no such thing. Respondent has always conceded that Water District had superior rights to reclaim for its own use, as of January 1, 1955, the energy under contract to Respondent. Water District did not reclaim the energy. The Decision below simply holds that having failed to do so because of its announcement that it had no use for the energy until May 31, 1987, Respondent had the right to that energy in conformity with Section 5(b) of the Act.

Finally, Petitioners make recurring use of the argument that whatever statutory renewal rights Respondent possessed were "legitimately extinguished by the execution of the 1945 contract with the third parties." (United States Petition, p. 16) This retrospective improvisation was rejected by the Court of Claims which said (United States Appendix B, p. 29):

> "But we think that the intention of the Government and the third parties when they made the 1945 contract is not conclusive, and indeed is scarcely relevant, so far as the plaintiffs are concerned."

Plainly, the Court of Claims was giving expression to the obvious principle that the provisions of a contract cannot nullify the clear mandate of a statute which confers rights on an entity which is not a party to the contract.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

JESSE CLIMENKO
Attorney for Citizens Utilities Company
30 Broad Street
New York 4, N. Y.

GALLOP, CLIMENKO AND GOULD
MILTON S. GOULD AND ARTHUR S. FRIEDMAN
30 Broad Street
New York 4, N. Y.
Of Counsel

APPENDIX A

Section 4(b) of the Boulder Canyon Project Act of 1928, 43 U. S. C. 617c, 45 Stat. 1058, provides as follows:

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this act.

Article 4 of the 1941 Regulations (B. 1131) provided:

4. Allocation of Energy

(a) *Firm energy*

Firm energy shall be allocated as follows:

Allottee	Percentage	Use by allottee restricted to following
State of Nevada	17.6259	In Nevada only.
State of Arizona	17.6259	In Arizona only.
Metropolitan Water District of Southern California (hereinafter called the District).	35.2517	Pumping Colorado River water into and in its aqueduct.
City of Burbank	.5773	
City of Glendale	1.8475	
City of Pasadena (the three last above-named cities are hereinafter called the "municipalities").	1.5847	
City of Los Angeles	17.5554	
Southern California Edison Company Ltd.	7.0503	
The Nevada-California Electric Corp.	.8813	
	100.0000	

The United States reserves such electrical energy as may be desired by it at a maximum demand not to exceed 20,000 kilowatts. Beginning on June 1, 1941 the energy actually taken by the United States under this reservation shall be deducted equally out of the respective allocations of the City and the Company. Such energy shall be delivered to the United States at the Power Plant, and shall be measured at the point of delivery by meters furnished and installed by the United States. Credits to the City and Company for such energy will be given on monthly bills. The United States will use such energy only for its own use or for resale in construction or operating camps maintained by the United States, or for any purpose in the area bounded by the east line of Range 6 East, the south line

of Township 20 South, the east line of Range 62 East, the south line of Township 23 South, M. D. M., Nevada; and the south line of Township 29 North and the east line of Range 21 West, G. & S. R. M., Arizona. The energy used by the United States for the construction and operation and maintenance of the dam and appurtenant works, exclusive of Boulder City, will not be included in the foregoing energy but shall be furnished from the station service system without charge and shall be classed as station losses and not considered in the amounts of firm or secondary energy in the promulgating of rates and charges.

(b) *Procedure respecting States' allocations*

Should either of the States not take its full allocation prior to April 26, 1950, the other may then contract and give notice of withdrawal of the energy not so taken up to 3.9169 per centum of the total firm energy, provided that the combined amount used by the two States shall not, at any time, exceed 35.2518 per centum of such total firm energy.

The District shall have the right to use for pumping Colorado River water into and in its aqueduct, so much of the firm energy allocated to the States, the City, the Company, and The Nevada-California Electric Corporation as may not be in use by them. So much of the energy allocated to the States not contracted for by them and not in use by them or the District, shall be taken and paid for, fifty-five percent (55%) by the City, forty per cent (40%) by the Company and five percent (5%) by the Nevada-California Electric Corporation. Such energy shall be released to the District by the City, Company, and The Nevada-California Electric Corporation, respectively, in the ratio of the above stated percentages (unless they agree upon different ratios, subject to the following provisions:

(i) If the District shall make a firm contract with the United States for the then remaining balance of the period ending May 31, 1987, for part or all of such unused States' energy (subject to the first right of the States thereto) such contract shall be made effective upon two years' written notice to the Secretary, and compensation to the allottees affected for main transmission line property rendered idle;

(ii) If the District does not so make a firm contract for such energy, then energy allocated to the States but not in use by them, shall be released to the District upon not less than fifteen (15) months' written notice to the Secretary and at such compensation as the District and the allottees affected may agree upon, to cover cost and overhead of replacing energy which otherwise would have been received at the Pacific Coast end of the main transmission lines by the allottees affected. Such cost shall include interest (at the rate of cost of money to the allottee affected) on investment in, and depreciation and operation and maintenance of, the plant capacity while required for the generation of such substitute energy; and also appropriate allowance for similar interest on and maintenance and depreciation of plant capacity rendered idle because of cessation of generation of such substitute energy until such time as such plant capacity would otherwise have been installed by the allottees affected for their own requirements. If the District and the allottees affected fail to agree on the amount of such compensation, such energy shall nevertheless be released to the District, and the disagreement shall be determined by arbitration. Pending such determination, energy so released shall be paid for by the District at the rate for firm energy but the determination of compensation by arbitration shall not be controlled by such rate.

(iii) If, due to temporary deficiency in secondary energy regularly used by the District, substitute energy is requested by the District in excess of the energy made available under the foregoing subparagraph (ii) the City, the Company, and/or The Nevada-California Electric Corporation may release so much energy as

may be practicable on the same terms as provided in such subparagraph.

(iv) In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it, then the Secretary shall dispose of such unused energy until required by the District, crediting on the District's obligation the proceeds of such disposition as received; provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to the City, the Company and The Nevada-California Electric Corporation the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for such energy, in the same proportion, and subject to the same rights with respect to proportions thereof not taken by others, as in the case of secondary energy. The rights of the City, the Company and The Nevada-California Electric Corporation so to contract shall be deemed to have been waived unless, within 30 days after offer by the Secretary of such opportunity, such offer is accepted.

APPENDIX B

Exhibit C

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D. C.

March 2, 1954

My dear Mr. Gould:

Recently there has been an interchange of correspondence between this office and The City of Los Angeles, the Southern California Edison Company, and the California Electric Power Company, pertaining to an extension of the term of contract of the California-Pacific Utilities Company for power and energy from the Hoover Dam Power plant of the Boulder Canyon Project. A copy of our joint letter to the above three allottees, together with a copy of the Memorandum from the Office of the Solicitor, is enclosed for your information. You will note that we are instructing the Commissioner of Reclamation to extend the term of contract of the California-Pacific Utilities Company as indicated in the joint letter.

If you are interested in extending your contract for Hoover Dam power and energy, it is suggested that you confer with the regional Director of the Bureau of Reclamation at Boulder City, Nevada.

Sincerely yours,

/s/ DOUGLAS MCKAY
Secretary of the Interior

Mr. Milton S. Gould
Citizens Utilities Company
Greenwich, Connecticut.
Enclosures 2

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington 25, D. C.

February 18, 1954

Memorandum

To: Under Secretary Tudor
From: William J. Burke
Subject: California-Pacific Utilities Company

The extant contract with the Metropolitan Water District of Southern California is that of May 29, 1941. This contract is in excess of the District's needs for firm energy. The United States can sell the unused District firm energy. The contract of November 21, 1941 with the California-Pacific Utilities Company is for a purchase of the District's unused firm energy. The subject-matter energy of the contract of May 31, 1945 with the City of Los Angeles, the Southern California Edison Company, Ltd., and the California Electric Power Company is defined in the sixth Whereas clause as all Boulder firm energy unused by the District for pumping water "and unused by the resale consumers under contracts referred to in Article 5 hereof." The California-Pacific Utilities Company is one of such "resale consumers" to the extent of 20,000,000 kwh.

Thus, the conclusion is compelled that the 20,000,000 kwh unused District energy as of December 31, 1954, contracted for by the California-Pacific Utilities Company under its November 21, 1941 contract is excluded from the "unused energy" contracted for by the City of Los Angeles, Edison Company, and California Electric under the May 31, 1945 contract. Such unused District energy is available for sale by the United States without obtaining the consent of the City of Los Angeles, Edison Company, and California Electric. I recommend that letters, accordingly, be sent to Kime, Ernst, Davenport and Morris.

s/ WILLIAM J. BURKE
William J. Burke
Special Assistant to the Solicitor

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D. C.

March 2, 1954

Gentlemen:

Your letters of January 18, January 29, and January 30, 1954, respectively, pertaining to the future supply of Boulder Canyon Project power and energy from the Hoover Dam to the California-Pacific Utilities Company, have been received.

Subsequent to the receipt of your letters, this matter was referred to the Office of The Solicitor, Department of the Interior. There is enclosed for your information a copy of a Memorandum, dated February 18, 1954, prepared by Mr. William J. Burke, Special Assistant to the Solicitor.

In accordance with the Memorandum of the Office of The Solicitor, we are instructing the Commissioner of Reclamation to offer to extend the contract of the California-Pacific Utilities Company for such term as the Company may desire, up to midnight of May 31, 1987, with a provision that the power and energy may be withdrawn in whole or in part by the Metropolitan Water District of Southern California only upon a showing by the District of its needs for such power and energy. The Commissioner of Reclamation is also being instructed to offer a similar extension of contract to the Citizens Utilities Company.

We are sending copies of this letter to the Metropolitan Water District of Southern California, Colorado River Commission of Nevada, Arizona Power Authority, Cali-

fornia-Pacific Utilities Company, and Citizens Utilities Company.

Sincerely yours,

(sgd) DOUGLAS McKAY
Secretary of the Interior

The City of Los Angeles
Department of Water and Power
Los Angeles 54, California

Southern California Edison Company
Edison Building
Los Angeles 53, California

California Electric Power Company
Riverside, California

Enclosure

Copy to:

1. Metropolitan Water District of So. California
2. Colorado River Commission of Nevada
3. Arizona Power Authority
4. California-Pacific Utilities Company
5. Citizens Utilities
6. Regional Director, Boulder City, Nev.
7. Regional Counsel, Los Angeles, Calif.

(All with copy of Memorandum of Solicitor of 2/18/54)

Exhibit C-1

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D. C.

MAR—2 1954

Gentlemen:

During the last few months, there has been an interchange of correspondence between this office and The City of Los Angeles, the Southern California Edison Company, and the California Electric Power Company, with reference to the possibility of extending the contract of the California-Pacific Utilities Company for power and energy from the Hoover Dam Powerplant of the Boulder Canyon Project. Following the last letters from the above allottees, this matter was referred to the Office of The Solicitor of the Department of the Interior and as a result of a Memorandum from the Solicitor's Office we are instructing the Commissioner of Reclamation to offer to extend the contracts of both the California-Pacific Utilities Company and the Citizens Utilities Company as indicated in the attached copy of our joint letter, including the Memorandum, to the three allottees mentioned above.

You will note that a provision is to be included which will protect your rights with reference to again obtaining power and energy from the California-Pacific Utilities Company and the Citizens Utilities Company, at such time

as a showing can be made as to the needs of this power and energy for your own use.

Sincerely yours,

(sgd) DOUGLAS MCKAY
Secretary of the Interior

Metropolitan Water District
of Southern California
306 West Third Street
Los Angeles 13, California

Enclosures 2

Copy to: Regional Director, Boulder City, Nevada
Regional Counsel, Los Angeles, California

FHCraddock:mc

Exhibit D

CITIZENS UTILITIES COMPANY

March 16, 1954
Kingman, Arizona

E. G. Nielson, Regional Director
U. S. Bureau of Reclamation
Boulder City, Nevada.

Dear Mr. Nielson:

We wish to confirm our visit to Boulder City in reference to the letter of March 2, 1954 addressed to Mr. Milton S. Gould.

Please be advised that in accordance with the memorandum from the office of the Solicitor, dated February 18, 1954, and the letters of the Secretary of the Interior, we accept the offer to extend up to midnight of May 31, 1987 the existing contract for the supply of power and energy from Hoover Dam.

Yours very truly,

/s/ JOHN S. GIBBS
John S. Gibbs
Vice President

JCG:mlh

cc. Milton S. Gould
Douglas McKay, Secretary of the Interior

Exhibit F

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D. C.

December 2, 1954.

MR. JOHN C. GIBBS,
Vice President, Operations and Engineering,
Citizens Utilities Co., Greenwich, Conn.

MY DEAR MR. GIBBS: As you know from Solicitor Davis' letter of September 1, 1954, and other correspondence, as well as from discussions of the matter between representatives of your company and of this Department, the conclusion has been reached that we are without authority to extend your company's existing contract for Hoover Dam energy.

It has no doubt been clear to your company from Mr. Davis' letter, as well as from the other recent correspondence and discussions, that the existing contract cannot and will not be extended or renewed and we must now reaffirm that position.

As you were advised in Mr. Davis' letter of September 1, we have reached this conclusion only with the greatest reluctance.

Sincerely yours,

FRED G. AANDAHL,
Assistant Secretary of the Interior.

Exhibit Q

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington 25, D. C.

September 1, 1954

Subject: Renewal of contract with reference to Needles, California and Kingman, Arizona for Boulder Canyon Power

Mr. John C. Gibbs, Vice President
Operations and Engineering
Citizens Utilities Company
125 East Putnam Avenue
Greenwich, Connecticut

Dear Mr. Gibbs:

The right of the Secretary of the Interior to renew the above contracts has been under consideration by the Department of the Interior for many months. The Solicitor's office has spent a great deal of time in the study of the problem. The matter was presented to the Acting Deputy Solicitor, Mr. William J. Burke, last spring, but he was only given two hours in which to examine the situation, and all persons have been informed that the opinion at that time expressed was only one of the most meager first impression.

I should first comment that in my mind the matter is not entirely clear, and the Secretary is confronted with

an ambiguous situation. My judgment, however, is that the Secretary lacks the authority to renew these contracts, because the power represented by them, which is a portion of the allotment of the Metropolitan Water District, was sold by that District to the Edison Company, California Electric and the City of Los Angeles by the contract of May 31, 1945.

There seems to be no question that this power is a portion of the original allotment to the Water District and that it was sold to Needles and Kingman because the Water District at that time had no use for it. The contracts by which it was sold provide that they expire December 31, 1954. As I see it, therefore, the fundamentals of the controversy hinge upon the language in that contract. Section 14(a) of that contract provides, in substance, that the Water District sells to the City, Edison and California Electric all firm energy allotted to the District unused by the District for pumping into and in its aqueduct "and unused by resale customers under contract referred to in Article 5 hereof." Article 5, which by the quoted language, I believe, we may consider as incorporated into the contract, identifies the present contracts of Kingman and Needles, both of which have an expiration date of December 31, 1954.

It seems to me that under this language, during the life of the contract, clearly any energy not used by Needles and Kingman is sold to the City, Edison and California Electric. Energy used by them under the contracts existing at that time is, of course, not sold to the three purchasers. The 1945 contract identifies the Needles-Kingman contracts and I feel incorporates these contracts into the 1945 contract. Such an incorporation has the effect, it seems to me, of including the expiration date of the Needles-Kingman contracts. In other words, there is incorporated into the

1945 contract an exception of the power sold, and that exception is the Needles-Kingman contracts, which run to a definite expiration date. Therefore, when the Needles-Kingman contracts expire December 31, 1954, the energy which Needles and Kingman have been taking becomes "unused * * * under the contract." The moment that the Needles-Kingman energy becomes unused by those communities, which it does when the contract expires and which the 1945 contract clearly indicates, the right to purchase that energy passes to the City, Edison, and California Electric.

I frankly concede that the language can be read to mean that the energy then (1945) being used by the resale consumers (Needles and Kingman) is not sold to the three purchasers, and, therefore, is exempt from the 1945 contract, in which case the Secretary might be at liberty to market it under the regulations, but considering the fact that the Needles contract is incorporated by reference into the 1945 contract, which would include the expiration date, I am inclined to the view that when the Needles contract expires, the energy which has been passing under that contract becomes "unused" * * * under the contract referred to in Article 5 hereof.

It cannot be overlooked that the Water District is the primary allottee of this power and that it agreed to purchase it and to pay for it, and the power belongs primarily to the Water District. The Water District is not using all of it. If no one else used it, the Water District would have to pay for it. Instead of that, the Water District sells it to the three purchasers. The Water District, it seems to me, could have reserved it and continued the contracts with Needles and Kingman; it did not elect to do so.

It is frankly conceded that fairness and the economics of the entire situation strongly impel one to a renewal of these contracts. It is with the utmost of reluctance that I have arrived at the opinion herein expressed. It is also to be regretted that the primary allottees do not see their way clear to permit the sale of this energy to these small communities, which lies much closer to the Boulder Canyon development that do the allottees, but as a matter of the legal interpretation of the contracts, I feel driven to the conclusion herein expressed.

Sincerely yours,

/s/ CLARENCE A. DAVIS
Solicitor

Exhibit R-1

(VIGNETTE)

IN REPLY REFER TO

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Region III
Boulder City, Nevada

November 8, 1954

To: Commissioner, Washington, D. C. Attention: 600

From: Regional Director

Subject: Extension of power sales contracts with California-Pacific Utilities Company and Citizens Utilities Company —Boulder Canyon Project

As you perhaps realize, this office finds itself in a rather difficult position relative to the above subject.

I believe you are cognizant of the circumstances which have brought about this situation. Your speedletter of March 4, 1954 instructed this office to prepare drafts of contract supplements extending the power sales contracts with both the California-Pacific Utilities Company and the Citizens Utilities Company. Drafts of such contracts were prepared and transmitted to your office by letter of March 16, 1954.

We have since that date received no indication from your office as to the status of this matter other than a copy of the Solicitor's September 1, 1954 letter to Mr. John C. Gibbs, Vice-President of Citizens Utilities Company, subject: "Renewal of contracts with reference to Needles, California and Kingman, Arizona for Boulder Canyon

Power". As evidenced by our teletype BC-WA 277 to you on October 13, 1954, the State of Nevada did not consider the Solicitor's letter of September 1 a definite reversal of the Secretary's letters of March 2, 1954 to each of the companies informing them that you had been instructed to extend the term of their respective contracts for power and energy from Hoover Dam Powerplant. Under the circumstances we feel that the companies' attorneys may view the Solicitor's letter of September 1 in a similar light, in which case they may claim that they have not been definitely notified that their contracts are not to be extended, and that lacking such notification they have taken no steps toward arranging for an alternate power supply. This situation bears examination to determine the need for an immediate formal notification to the companies informing them definitely of their status as regards future power supply.

The termination date of December 31, 1954 for the existing Hoover contracts with both of these companies is imminent and we presumably have no authority to continue deliveries of power and energy to them from Hoover Dam Powerplant after midnight of December 31, 1954. This office has no knowledge that definite arrangements have been made by either company for electric service to them in the vicinity of Kingman and Needles after December 31, 1954.

Representatives of this office have been in contact with local representatives of the Citizens Utilities Company and as you know there has been correspondence with your office relative to the California-Pacific Utilities Company. However, no specific proposals have resulted from these contacts with either company. The situation has developed to the point where the time remaining between now and December 31, 1954 will not permit physical arrangements being

made for delivery of power and energy to both companies from Davis Dam, and the continued delivery of electric power and energy from Hoover Dam Powerplant to both or either of the companies will involve new contractual arrangements with several Boulder Canyon Project allottees as well as with the companies.

You can undoubtedly appreciate my request to you for direction as to what action I should be prepared to take as of midnight December 31, 1954.

E. G. NIELSON

In triplicate
Copy to: Regional Solicitor, Los Angeles, California
Project Engineer, Boulder City

Exhibit R-2

W-BC 347 TELETYPE

To: Regional Director, Boulder City, Nevada
Attn: 3-600

Subject: Extension of power sales contracts with California-Pacific Utilities Company and Citizens Utilities Company—Boulder Canyon Project

Reurlet November 8 and other related correspondence, entire matter now being considered in Department. Will advise you when decisions have been reached.

W. A. DEXHEIMER
Commissioner

By W A DEXHEIMER

Exhibit R-3

W-BC 349 W-LA 17 TELETYPE

To: LA Regional Director, Boulder City, Nevada
LA Regional Solicitor, Los Angeles, California

Subject: Power supply for Citizens Utilities Company and California Pacific Utilities Company—Boulder Canyon Project

Confirming Nielsen's telephone conversation, Nielsen and Coffey with appropriate members their staffs should arrive here for conferences beginning November 29 dealing with engineering, legal and policy aspects of above subject and related matters.

W A DEXHEIMER
Commissioner of Reclamation

EDMUND T FRITZ
Edmund T. Fritz
Associate Solicitor
Water and Power

Copy to: Regional Director, Boulder City, Nevada
Regional Solicitor, Los Angeles, California
Commissioner of Reclamation
Code 603, Reclamation

Office - Sup...
FILED
NOV 2
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 527

THE UNITED STATES, *Petitioner*

v.

CITIZENS UTILITIES COMPANY, ET AL

No. 528

THE CITY OF LOS ANGELES, *Petitioner*

v.

CITIZENS UTILITIES COMPANY, ET AL

On Petitions for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT, CALIFORNIA-PACIFIC UTILITIES COMPANY, IN OPPOSITION

EZEKIEL G. STODDARD
ARNOLD M. LERMAN
1625 Eye Street, N. W.
Washington 6, D. C.
Attorneys for Respondent, California-Pacific Utilities Company

COX, LANGFORD, STODDARD & CUTLER
1625 Eye Street, N. W.
Washington, D. C.
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 527

THE UNITED STATES, *Petitioner*

v.

CITIZENS UTILITIES COMPANY, ET AL

No. 528

THE CITY OF LOS ANGELES, *Petitioner*

v.

CITIZENS UTILITIES COMPANY, ET AL

On Petitions for a Writ of Certiorari to the United States Court of Claims

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OPINION BELOW

The opinion of the Court of Claims is reported in 149 F. Supp. 158 (Ct. Cls. 1957).

QUESTION PRESENTED

Whether California-Pacific Utilities Company, the holder of a contract executed pursuant to the Boulder Canyon Project Act to purchase electrical energy from the United States, was entitled to a right of renewal pursuant to Section 5(b) of the Act which expressly granted such right to "the holder of any contract for electrical energy."

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. 617, *et seq.*[1] The regulations involved are the General Regulations for Lease of Power, issued April 25, 1930 and amended March 10, July 1, and November 16, 1931; and General Regulations for Generation and Sale of Power in accordance with the Boulder Canyon Project Adjustment Act promulgated May 20, 1941.[2]

STATEMENT

On December 28, 1937, the predecessor of California Pacific Utilities Company (hereinafter "Cal-Pac") entered into a contract with the United States (acting through the Secretary of the Interior) for the purchase from the United States of a small amount of electrical energy generated at Boulder Canyon Dam.[3] The contract provided for annual purchases of energy until December 31, 1954 and was executed "particularly pursuant to . . . the Boulder Canyon Project Act."[4] This Act governed the operation of Boulder Canyon Dam and contained the Secretary's authority to sell energy on the terms and conditions stated

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[1] B. 13 *et seq.* References "B. —" are to a bound volume entitled "Boulder Canyon Project Final Reports Part I—Introductory, Bulletin II, Hoover Dam Power and Water Contracts and related data, the United States Department of Interior, Bureau of Reclamation." It contains copies of the statutes, regulations, contracts, opinions and related data referred to in the brief hereafter. This volume was introduced in the case below as Government's Exhibit 1. Relevant portions of the Project Act are set forth in Appendix B.

[2] B. 1113 *et seq.*; B. 1129 *et seq.* Relevant portions of the Regulations are set forth in Appendix A.

[3] The contract is set forth at B. 639 *et seq.* It was amended in 1941 in respects not material here. B. 985 *et seq.*

[4] B. 639-640; B. 985-986.

therein. In order to distribute the energy purchased, the contractor constructed transmission lines from Boulder Canyon to Needles, California and Nelson and Searchlight, Nevada, and thereafter supplied these communities with the energy it purchased at the Dam.

Before December 31, 1954, Cal-Pac requested renewal of its contract for energy pursuant to the terms of Section 5(b) of the Project Act which provided:

> "(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply."

But the Secretary refused to renew the contract or to compensate Cal-Pac for his failure to renew.[5] Cal-Pac then brought the action below for damages. Its petition was consolidated with that of Citizens Utilities Company (hereinafter "Citizens"), another contractor similarly situated. Cal-Pac and Citizens alleged that Section 5(b) of the Project Act entitled them to a renewal of their contracts. The Court of Claims unanimously agreed and granted summary judgment for Cal-Pac and Citizens, directing that the amount of the judgment be determined in further proceedings under Rule 38(e) of that Court.[6] The Government and the City of Los Angeles (hereinafter "City") thereupon petitioned this Court for a writ of certiorari.

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[5] The exchange of correspondence is set forth in Exhibits A through E attached to Cal-Pac's petition in the Court of Claims. (R. 39-47).

[6] 149 F. Supp. 158, 163.

REASONS FOR DENYING THE WRIT

1. The Issue in This Case Is Far Too Narrow to Warrant Certiorari

This controversy concerns the meaning of a special statute governing the operation of a single hydroelectric project. The sole issue determined by the Court of Claims was that, under the circumstances of this case, Cal-Pac and Citizens were the "holders of contracts for electrical energy" within the mandatory renewal provision of the statute and that they were therefore entitled to a renewal of their contracts. The issue presents no conflicts with rulings of other courts. It raises no questions of general applicability to other statutes or other cases. Indeed, the petitioners have not even suggested that the controversy affects anything other than energy contracts at Boulder Dam. There are currently nine contractors for energy. At the outset, then, it is clear that these petitions raise an extremely narrow issue whose broadest conceivable effect is confined to the renewal of contracts to purchase energy generated at a single dam. On this basis alone, respondent submits that there is no special significance in this case warranting the attention of this Court.

2. The Opinion Below Is Limited by the Unique Facts of This Case to a Situation Which, as a Practical Matter, Will Never Arise Again

The issue raised by this case is even more confined than is suggested above, for the Court's holding below is further restricted in its impact by the singular facts upon which it is based. Its total impact is limited solely to the contracts held by the two respondents to purchase less than 1.7 per cent of the energy produced at a single dam.[7]

[7] Of the total firm energy generated, 4,240,000,000 Kilowatt-hours (Regulations, Art. VII, B. 1121), Cal-Pac was entitled to a maximum of 20,000,000 Kilowatt-hours (B. 642), and Citizens Utilities Company to a maximum of 50,000,000 Kilowatt-hours (B. 660).

The energy purchased by Cal-Pac from the United States has been characterized as energy "unused" by the Metropolitan Water District (hereinafter the "District"). This appellation was the result of the Secretary's initial allocation plan[8] for distribution of the energy to be produced on completion of Boulder Dam. In 1930, the Secretary promulgated Regulations which, as amended, allocated 36 per cent of this energy to the District and which contemplated that the District would guarantee payment for the full 36 per cent. But while the District could call for up to 36 per cent of the energy, it was entitled to purchase only so much of its allocation as it would use for pumping water into its aqueduct. The Regulations expressly contemplated that the District might not be able to use the full 36 per cent for pumping by the time deliveries were to begin and, consequently, further provided that the Secretary "dispose of such unused energy until required by the District for said purpose."[9]

The whole burden of the petitioners' case is directed to the contention that a contract to purchase the so-called "unused" energy is somehow different from other contracts under the Project Act with respect to the renewal provisions of the Act. Without regard to the merits of this contention, it is now quite clear that any such distinction is, for all practical purposes, entirely moot except for this case. As of the current date, the entire energy output of Boulder Dam has been purchased until 1987.[10] These

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[8] Article V, Regulations, R. 1113, 1115-1120. The relevant portion of Article V, as amended, appears in Appendix A hereto.

[9] See *Id.* at p. 4a. (Section entitled "Of Firm Energy Allocated to but not Used by the District")

[10] In 1945, the Secretary executed a contract which petitioners contend sold all unused energy. (City Petition, 7; Gov't Petition, 15). Cal-Pac urged below that this contract did not sell the energy belonging to it and Citizens. The Court of Claims expressly noted the ambiguity of the contract with respect to this small amount, but deemed the 1945 contract irrelevant to the issue in the case. 149 F. Supp. 158, 161-162.

purchases include absolutely all of the energy allocated to the District, but "unused" by the District for pumping. In fact, in the Court of Claims, the petitioners expressly contended that all "unused" energy had been sold to the third parties below.[11] At the same time, the District has made clear the fact that there will be no "unused" energy available for sale by the Secretary after 1987.[12] In short, there is simply no real likelihood of a recurrence of future contracts for sale of "unused" energy. And, of course, if there is no "unused" energy available, there is nothing to which renewal rights to such energy may attach. Therefore, the problem raised by these petitions is meaningless apart from this case.

We reach the same conclusion even if we were to ignore these facts and assume that "unused" energy may somehow be available for sale by the Secretary at a future date. Actually, the Court of Claims opinion, by directing its ruling to the particular circumstances under which Cal-Pac's contract arose, makes it perfectly clear that the Secretary is in a position to prevent the recurrence of any issue posed in this case. These circumstances are as follows.

In 1937 when the Dam neared completion and the time approached for beginning delivery of energy to the District, the Secretary and the District were then able to determine how much energy the District could not use for pumping and which would therefore be available for disposition by the Secretary to others. Accordingly, in August of 1937, the District advised the Secretary that there would be "definitely available for disposition by the Secretary without possibility of utilization by the District," unused energy until the end of 1954, and requested the Secretary to

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[11] *Ibid.*

[12] Indeed petitioner City claims that none will be available after May 31, 1959! (City Petition, 7 n. 4) Cal-Pac has no primary knowledge of this latter fact.

dispose of such "unused" energy until required by the District.[13] The Secretary then offered this energy to certain other parties to whom the allocation plan gave the first opportunity to purchase the "unused" energy and all of these parties declined the offer.[14] During this time Cal-Pac's predecessor made application for a portion of the District "unused" energy "until such time as they [the District] may require the power for their own use which we understand would not be for a period of approximately 17 years . . . ."[15] The Secretary then submitted to Cal-Pac's predecessor a contract providing for delivery of energy beginning at a prescribed date and extending to "and including December 31, 1954, from which latter date it is estimated that Metropolitan Water District will require for its own purposes all energy contracted for by it."[16]

It was these facts which led the Court of Claims to note that it was dealing with a contract which contained no explicit renewal provision and with a situation in which there had been absolutely no focus upon renewal.[17] At the time of the contract the parties simply had no indication that the subject matter of the contract, *i.e.*, "unused" energy, might be available after the contract term. Certainly the recurrence of this situation would be unlikely in any circumstances. And now, with the Court of Claims ruling before him, it is entirely within the Secretary's power to prevent such a recurrence simply by dealing with any question of renewal in executing any future contracts for "unused" energy. Indeed, the Court of Claims opinion implies that under appropriate circumstances the Secretary and a contractor may agree that there will be no

[13] Exhibit 11 to Gov't Brief below (R. 174).

[14] Exhibits 13-18, 20 to Gov't Brief below (R. 178-194, 197).

[15] Par. 8, Gov't Answer below (R. 51).

[16] Par. 3, Exhibit 19 to Gov't Brief below (R. 196).

[17] 149 F. Supp. 158, 161.

renewal of a contract.[18] Thus, the petitioners are now asking this Court to review an interpretation of the application of the Project Act not only to a type of contract shortly to become extinct, but also to circumstances which the Secretary may hereafter avoid.

3. The Opinion Below Does Not Affect the Future Administration of Boulder Canyon Project

The petitioners urge that the Court of Claims opinion results in "confusing" the future administration of the Project. In the Government's view, the Secretary can no longer "safely make any short term interim arrangements for disposition of surplus energy . . . ."[19] The City apparently goes one step further and contends that even "the allottees" (contractors purchasing energy from the Secretary) are also now prevented from making any temporary contracts for resale of energy.[20] Both contentions are incorrect.

Insofar as the City's contention is concerned, the opinion below bears absolutely no relation to sales of energy by anyone other than the Secretary. The Court of Claims held only that the Secretary, acting on behalf of the United States and exercising his statutory authority to make contracts, was required by the Project Act to renew *his* contract with Cal-Pac under the circumstances of this case. Clearly, the City or any other "allottee" may sell its energy for whatever term it pleases, and the administrative injury envisioned by this petitioner is non-existent.

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[18] *Ibid.* The Court noted that no issue of "waiver" had been seriously urged and that if it had been, the circumstances "might well rebut" any inference of waiver of the statutory right to renewal. We infer that the Court believes that contractors can waive this right and agree not to take a renewal.

[19] Gov't Petition, 16-17.

[20] City Petition, 18-19.

The Government's purported claim of "confusion" is also without merit. The Government expresses concern for short term dispositions of "unused" energy when there is no real likelihood that such energy will be available for future sale. It worries over a situation which the Secretary may readily avoid, for the opinion below certainly implies that, under appropriate circumstances, the Secretary can expressly agree with a contractor to enter into a non-renewable short term contract. And it expresses its concern where there is even no practical administrative reason why such short term dispositions would be sought in circumstances within the holding of this case. Certainly it is only in the most remote and speculative situation, if at all, that the Secretary would object to selling energy for the full period of its availability, to a contractor willing to build facilities to distribute the energy to consumers in the area of the dam. And we have the Government's own administrative determination to this effect in the words of the Solicitor of the Department of the Interior[21] when the Secretary felt "compelled" to deny Cal-Pac a renewal:

> "It is frankly conceded that fairness and the economics of the entire situation strongly impel one to a renewal of these contracts. It is with the utmost of reluctance that I have arrived at the opinion herein expressed. It is also to be regretted that the primary allottees do not see their way clear to permit the sale of this energy to these small communities, which lie much closer to the Boulder Canyon development than do the allottees, but as a matter of the legal interpretation of the contracts, I feel driven to the conclusion herein expressed."

4. The Damages Are Irrelevant and Virtually Insignificant Since the Government Can Readily Mitigate Them

The Government urges the substantial damages incurred by respondents in this case as a reason for granting the

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[21] Exhibit B to Cal-Pac's Petition in the Court of Claims (R. 42, 44).

writ.[22] Of course, the damages are the Government's own doing and, we submit, the amount is totally irrelevant. Nor has the amount of damages ever been determined. In any event, the Government can mitigate, to the point of relative insignificance, whatever damages it caused simply by renewing respondents' contracts as requested or by selling respondents low cost energy from other sources. Cal-Pac has always been willing to accept a renewal or to accept other energy to prevent damages.

5. The Court of Claims Decision Is Correct

In 1928, Congress enacted the Boulder Canyon Project Act to enable construction and operation of a Dam and related facilities at Boulder Canyon. The Act enabled creation of a primary source of hydroelectric energy for the Pacific Southwest and it looked to public and private utilities to invest in facilities necessary to distribute energy generated at the Dam to consumers in the area. At the same time, the Act contemplated that the sales of energy to the utilities would furnish revenue which would be used to defray the costs of construction and operation of the Project. Section 5 of the Project Act established an integrated scheme of contract provisions designed to accomplish both of these objectives by conferring authority upon the Secretary to sell energy pursuant to contracts governed by the requirements stated in the Section.[23]

Generally, these requirements were as follows: no contract was to exceed 50 years; charges for energy were to be set with a view to repaying the Government's investment in the project, and contracts were to be executed with financially responsible applicants; in the case of conflicting applications states were to be given first preference and other preferences were to follow in accord with the public interest and the policy of the Federal Water Power Act;

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[22] Gov't Petition, 18.

[23] Section 5 is set forth in Appendix B.

and larger contractors were required to share transmission facilities. In addition, the Section also required that "the holder of any contract for electrical energy . . . shall be entitled to a renewal" unless its facilities were acquired and the contractor appropriately compensated.

The indebtedness of the statutory contract scheme to the Federal Water Power Act was made clear, not only by the preference requirements, but also by the renewal provision. This provision was taken almost verbatim from the Power Act,[24] and contemporary legislative materials indicate that the renewal section was written with the Power Act in mind.[25] The Power Act had provided for the licensing of public and private parties to build and maintain facilities for the purpose, *inter alia*, of distributing energy to communities in the region. The Act required that, upon expiration of any license, the licensee was absolutely entitled to a renewal except where his facilities were acquired and he was appropriately compensated.[26] The renewal scheme thus accomplished two primary objectives: it provided an inducement to the licensee to invest in and operate facilities by granting a right to renewal or compensation; and the Government retained the right to acquire the licensee's facilities, thus insuring a continuity of adequate service to communities serviced by the licensee.

In the court below, Cal-Pac emphasized the fact that the language of the Project Act entitled the holder of *any*

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[24] See 16 USC §§ 807, 808 set forth in Appendix C.

[25] Senator Johnson of California stated on the Senate floor that: "Sub-division (b) of Section 5 is really part of the Federal Water Power Act." 66 *Cong. Rec.* p. 7251. And a Report of the Senate Committee on Irrigation and Reclamation stated: "Provision is made for renewals along the lines provided in the Federal Water Power Act for renewals of licenses." *Sen. Rpt.* #654, Part I, p. 27, 69th Cong., 1st Sess.

[26] See Appendix C.

contract for energy to a renewal and that the Act specifically required that the Secretary's contracts "shall be governed" by this renewal provision. Cal-Pac also urged that if any limitation were to be imposed on this language, it should certainly be done with a view to the express origins of the provision in the Power Act. The Court of Claims apparently agreed. It found that Cal-Pac unquestionably held a contract for electrical energy pursuant to the Project Act and that "the equity of the statute" providing for renewal was fulfilled by the facts in this case.[27] The Court expressly found that, as a matter of fact, the renewal privilege for Cal-Pac would protect Cal-Pac's investment in facilities to distribute Boulder Dam energy and would protect its customers who had become dependent upon the continued flow of that electricity.[28]

In this connection, the Court below was apprised of the full effect of the failure to renew upon the citizens of the small communities of Needles, Nelson and Searchlight. As a result of its inability to obtain a renewal, Cal-Pac was forced to buy energy at almost four times the cost and to obtain from the California Public Utilities Commission an approximate 25 per cent increase of its retail rates in California—with a proviso for reimbursements to its customers in the event it later obtained a renewal of its energy contract.[29] The Boulder Dam energy properly deliverable to Cal-Pac was handed over to City, Southern California Edison Co., Ltd. (hereinafter "Edison"), and California Electric Power Co. (hereinafter "California Electric"), where its beneficial effect was so infinitesimal that it cannot even be reflected in rates to their consumers.

Despite all of the foregoing, petitioners now contend, as they contended below, that the language of the renewal

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[27] 149 F. Supp. 158, 162.

[28] *Ibid.*

[29] Public Utilities Commission of the State of California, Decision No. 51750, July 26, 1955.

provision in referring to "any" contract really meant only "some" contracts should be renewed: that not only the renewal provision, but all of the integrated contract provisions of Section 5 really applied only to a select group of "some" contractors; and that, despite its recitation to this effect, Cal-Pac's contract was not executed "particularly pursuant" to the Secretary's contracting authority in Section 5 of the Act and Cal-Pac did not therefore fall within this "select group." The whole burden of petitioners' argument is directed to a claim of error because the court below failed to distinguish Cal-Pac from their group of elite contractors to whom Section 5 purportedly applies. Examining petitioners' contentions in the context of the sequence of events since the passage of the Act is perhaps the best evidence that petitioners rely upon interpretations inconsistent with each other; inconsistent with prior administrative practice, and totally at war with the language and intent of the Project Act.

Section 4(b) of the Project Act required that, before any appropriations were made or any construction began, the Secretary should obtain contracts which were sufficient in his judgment to bring the United States enough revenue in 50 years to repay the costs of the Project.[30] On April 26, 1930, the Secretary contracted with the City and Edison to make these parties lessees of parts of the proposed dam and generating equipment and obligating them to generate the energy for themselves and others.[31] The contract also provided for the sale of 22 per cent of the dam's energy to them, and the contractors guaranteed to purchase an additional 42 per cent of the energy if such energy was not purchased by others. The Secretary then reported that this contract was sufficient by itself to provide revenues to pay for the project.[32]

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[30] See Appendix B, p. 6a.

[31] B. 291 *et seq.*

[32] Opinion of Attorney General, June 9, 1930 reported at B. 1245, 1252; Opinion of Comptroller General, October 10, 1930, reported at B. 1255.

Petitioners argue that the Court of Claims erred in failing to recognize that the integrated contract provisions of Section 5 apply only to the contracts required by Section 4(b) and thus do not apply to Cal-Pac.[33] In reply, it need only be noted that: Section 4(b) merely required a finding of fact by the Secretary that, before appropriations and construction, he had entered into contracts providing revenues sufficient to meet the costs of construction and maintenance of the Dam; that the Project Act contains absolutely no language limiting the Secretary's authority to enter into only those contracts necessary for his finding; that the "select group" thus nominated by petitioners as being subject to the Act's contract scheme require the conclusion that Congress legislated an entire statutory scheme to govern one contract and all others are excluded; and that, judged by this criterion, petitioners' "select group" is wholly inconsistent with its designation elsewhere of other contractors who fall within the group.[34]

After executing the City-Edison contract, the Secretary proceeded, on the same date, to enter into a contract with the District which, as amended, provided that the District would guarantee payment for .36 per cent of the energy at the Dam, but would purchase only so much of this energy as it could use for pumping water, with the remaining "unused" energy to be disposed of by the Secretary. Both the City-Edison contract and the District contract incorporated, and were executed pursuant to, a scheme of distribution of energy contained in the Regulations pro-

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[33] City Petition, 12-13.

[34] The Government claims that the Act applies to three "primary contractors"—the parties to whom 100 per cent of the energy was purportedly sold in 1930. Gov't Petition, 2-3, 9. City makes conflicting contentions that the Act applies: (a) To the one Section 4(b) contract (City Petition, 13); (b) To contracts of nine "allottees", (*Id.* at 13); or (c) To 6 contracts with firm commitments for 50 years, (*Id.* at 12).

mulgated by the Secretary earlier in 1930.[35] These Regulations, as incorporated in the District contract, contemplated that the energy generated at the Dam would be purchased in the following way:

1) City and Edison to purchase 22 per cent and to guarantee payment for an additional 42 per cent to the extent it was not sold to states and municipalities. (Edison's 9 per cent allotment was also shared with two other private companies.)

2) Arizona and Nevada to purchase up to 18 per cent each.

3) Some of a group of twelve municipal applicants to purchase up to 6 per cent.

4) The District to purchase up to 36 per cent for use in pumping and to guarantee payment for the full 36 per cent to the extent unused energy was not sold to and paid for by others.

5) Undesignated purchasers to purchase unused District energy to be sold by the Secretary.

During the subsequent fifteen years, the Secretary proceeded to execute contracts pursuant to his distribution scheme.

In 1931, he executed contracts with three of the municipalities[36] and with two private companies to whose rights others later succeeded.[37] In 1936, Nevada contracted to purchase part of its 18 per cent allotment.[38] In 1937, Cal-Pac and the other respondent, Citizens, contracted

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[35] B. 291, 323, 343, 351. The allocation portion of the Regulation is set forth in Appendix A.

[36] B. 405, 443, 461.

[37] B. 423, 479. (California Electric succeeded Southern Sierras and City succeeded Los Angeles Gas and Electric).

[38] B. 565, 581.

for their energy.[39] During World War II, the remaining "unused" District energy was sold principally to Defense Plant Corporation under the War Powers Act rather than Section 5 of the Project Act.[40] And, when this contract expired in 1945, the remaining "unused" energy was sold to City, Edison and California Electric.[41] Finally, in 1945, Arizona contracted for part of its allotment.[42]

Petitioners now suggest that the Secretary's contracts with City-Edison and the District were "primary contracts" covering sale of 100 per cent of the Dam's energy, and since these contracts alone assured full sale of the energy, they are the only contracts covered by the Act.[43] Petitioner City adds that Cal-Pac could not be included because it was purportedly not a party in the allocation plan allotting 100 per cent of the energy.[44]

Of course, the short answer to these contentions is the perfect clarity with which the distribution scheme establishes that the Secretary neither intended to nor did in fact sell 100 per cent of the energy to the petitioners' "select group" of three. This group did guarantee payment for 100 per cent of the energy, but only to the extent that it was not taken and paid for pursuant to other contracts expressly contemplated by the Regulations. Indeed, the Regulations conclusively demonstrate that, from the inception of the administration of the Project Act, the Secretary interpreted the Act to apply to other contracts he would execute at a later date, including contracts for sale of

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[39] B. 629, 657.

[40] See Art. 4, B. 934; B. 951, 961, 973. Unused energy was also sold for very brief periods to others under contracts which expired and to contractors who apparently did not desire to renew. B. 681, 703, 723.

[41] B. 1061.

[42] B. 1101.

[43] See n. 34, *supra*.

[44] City Petition, 12.

"unused" energy. And there was no reason then, nor is there any now, why all of these contemplated contracts are not within the explicit contractual scheme set up by the Act.

Certainly, the Project Act says nothing about "primary contractors", or "prime contracts", or "primary purchasers". These are all inventions of petitioners. Nor is there any reason for the application of the Act's contract provisions to such a select group. The States and municipalities received their preferences pursuant to the Act, but the petitioners would not include them in its coverage. None of the contracts executed by the Secretary could or did exceed the 50 year limitation, but the petitioners would read the limitation to be inapplicable to all but three contracts. Every contract, including Cal-Pac's, executed pursuant to the Regulations: recited that it was executed "particularly pursuant" to the Act; obligated the United States to deliver Boulder Dam energy; and obligated the contractor to pay the United States. Yet, these petitioners urge error because the Court did not interpret the Act's simple references to "contracts for energy" to cover only an elite group of three contractors.

The Court of Claims, after examining the same allegations made by petitioners, concluded that the only conceivable distinction between Cal-Pac's contract and that of other contractors rested on the fact that Cal-Pac purchased energy which the Secretary sold because the District could not use it.[45] It reached this conclusion after examining the variety of contracts entered into by purchasers and the range of variation displayed. The Court's conclusion was really one of fact, for each of the contracts executed obviously pursuant to the Act contained different provisions geared to the objectives sought by the Secretary in each case. Thus, some of the contracts were for

[45] 149 F. Supp. 158, 161.

50 year terms, others were not.[46] Some contained firm commitments to purchase energy, others did not.[47] Some were for "firm" energy alone, others contained additional rights to "secondary" energy, some concerned "unused" energy.[48] But all were clearly executed pursuant to the Secretary's authority in Section 5 and subject to the requirements stated therein.

The Court then properly concluded that a contract for "unused" energy was certainly not to be differentiated with respect to renewal or any other provision of the Act.[49] It was a contract for energy. The energy was sold by the United States. The Secretary, in retaining the right to sell "unused" energy was acting on the Government's behalf and was expressly carrying out the policy of keeping the sale of energy under the control of the United States. He was, at the same time, insuring that contract revenues would continue for retirement of the dam's cost.[50] We

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[46] *E.g.*, Respondents' contracts and Arizona's ran for less than 50 years. Nevada's, in effect, should also be included here because of Nevada's right to terminate at will.

[47] The original allocation plan contemplated that both Arizona and Nevada could terminate on short notice without further obligation and without prejudice to their rights to acquire another contract for energy. Art. V F (v), Regulations, in Appendix A, and see Art. 9 F (v) of Nevada contract. (B. 570).

[48] *E.g.*, District, City and Edison, among others, had rights to "secondary energy." City had rights to energy contracted for and "unused" by the municipalities for the purpose of serving their inhabitants, see Art. V F (ii), Regulations, in Appendix A, *to which City's renewal rights apply!* (Art. 26, City contract, B. 309).

[49] 149 F. Supp. 158, 162.

[50] The Court expressly noted that Cal-Pac's situation in this respect was precisely the same as the municipalities and states. Payment for the energy taken by the municipalites and states was guaranteed by City and Edison just as payment for the unused energy is guaranteed by the District. 149 F. Supp. 158, 161. We

believe that these findings compose a full answer to petitioners' contentions.

Actually, petitioners' difficulties really stem from their preoccupation with the fact that the Project Act contemplated a self-financing venture. Time and again, petitioners revert to the argument that Cal-Pac's contract is purportedly not covered by the Act's contract provisions because it did not contain a firm commitment for a 50 year term.[51] But in their zeal to exclude Cal-Pac from the Act's coverage, petitioners overlook the fact that they exclude virtually everyone else. We have no quarrel with the fact that the Act contemplated that revenues from sales of energy would be used to repay the Project's cost. But Congress did not legislate to build the Project for the purpose of financing it. This Act was clearly designed as well to develop distribution of energy to consumers in the region of the dam and to encourage the building of facilities to accomplish such distribution. We submit that the contract provisions of the Act were written with this specific objective in view. Surely, Cal-Pac has fulfilled this objective and it and its consumers are subject to both the burdens and benefits comprehended by the Act's contract scheme.

Finally, petitioners urge that even if Cal-Pac is entitled to invoke the statutory renewal provision, its right to do so is secondary to other contractors' "first opportunity to contract" contained in the Secretary's Regulations.[52] The Secretary's Regulations, as they were promulgated in 1930, stated that in sales of "unused" energy the Secretary would offer the energy to City, Edison and

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add that the revenues paid by Cal-Pac, the municipalities, and the states physically go to the United States and are used to repay the costs of the project.

[51] City Petition, 12, 13; Gov't Petition, 11-12.

[52] *Id.* at 14-17, City Petition, 15-19. See Regulations, "Of Firm Energy Allocated to but not Used by the District" in Appendix A, p. 4a.

California Electric before selling it to others. Before selling energy to Cal-Pac, in 1937, the Secretary expressly offered it to these contractors and the offer was expressly refused.[53] There is absolutely nothing in the Regulation to indicate that the "first opportunity to contract" would survive a refusal and thus become a second, third, and fourth opportunity. For this reason alone, the Court below was justified in rejecting petitioners' contention.

However, petitioners urge that the renewal provision of the statute specifically made Cal-Pac's right to renewal subject to a "second" opportunity of certain contractors to purchase the energy because the statute provided that contract holders shall be entitled to renewal upon "such terms and conditions as may be authorized or required under the then existing laws and regulations . . . ."[54] On its face, the statute categorically asserts a mandatory entitlement to renewal and simply states that existing laws and regulations shall govern the terms in the renewal contract. It thus requires no great effort to ascertain that the "terms and conditions" clause does not affect the right to renewal, but relates only to the contents of the renewed contract. To verify this fact, we have turned back to the origins of the renewal provision in the Federal Water Power Act where the "terms and conditions" clause appears in identical language and in an identical situation. Its use there leaves absolutely no doubt that it refers specifically to terms to be written into renewed contracts and does not qualify in any way the fact of the right to renewal.[55]

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[53] See n. 14 *supra*.

[54] Gov't Petition, 14.

[55] See 16 USC § 808 in Appendix C. In the Power Act, the clause was used to distinguish the contents of licenses renewed for one year (on their existing terms) from those of licenses renewed for longer duration (on terms and conditions authorized by law). And in no event could the "terms and conditions" clause affect the *right* to renewal, for there was simply no situation where renewal could not occur unless the licensee's property was acquired.

Ultimately, petitioners must really face the fact that Section 5(b) simply does not state what they would like it to state. It would have been a simple matter to allow the Secretary to renew at his discretion, or to allow him to select, by regulation, those contractors to whom renewal might be granted. But the statute does nothing of the sort. The right to renewal is stated in unequivocal terms; it is stated in mandatory language; and it is expressly made applicable to any contractor. After all is said and done, the simple fact remains that Congress expressly chose to grant a right of renewal to the holder of "*any contract*". Cal-Pac contracted for energy particularly pursuant to the Act. Certainly, the Court of Claims did not err in unanimously concluding that Cal-Pac was entitled to a renewal of its contract under the Act.

6. Other Issues Would Result in Judgment for Respondent

In the court below, Cal-Pac also contended that, entirely apart from Section 5(b) of the Project Act, it was entitled to a renewal by virtue of the incorporation into its contract of (1) the District contract[56] and (2) then existing regulations.[57] We do not believe that the Court of Claims

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[56] R. 641. Art. 20 of the District contract, thus incorporated, provided that "the holder of any contract for electrical energy, *including the District*, not in default *thereunder*, shall be entitled to a renewal thereof . . ." (R. 336) (Emphasis added). This clause is carefully cast in language that makes it applicable to *others* beside the District. Since the District contract also provided that the Secretary should sell energy unused by the District to others, it follows that these others to whom such energy is sold are the *other holders* of contracts for energy specified in the renewal clause.

[57] Art. XVII of the Regulations contained a renewal provision. (R. 1125) The Regulations were incorporated into Cal-Pac's contract by Art. 23 of the Cal-Pac contract. R. 648. Though the renewal provision did not appear in later Regulations, Art. 23 specifically provided that changes in Regulations would not impair the rights of the contractor.

determined these issues. And, in any event, they would require the same result of granting summary judgment for Cal-Pac.

CONCLUSION

There are no "special or important reasons" requiring this Court's attention to this case. The judgment of the Court of Claims involves no principles or issues of general interest, but is concerned solely with an application of a particular provision of the Boulder Canyon Project Act to a unique set of facts. Actually, the Court's holding does not even have significance for the future administration of the Project, for the facts of this case are such that the issue posed need never arise again. Even the damages claimed by Cal-Pac are relatively insignificant in light of the Government's ability to mitigate them. And, in any event, the petition has no merit if only for the reason that the Court of Claims was entirely correct in its unanimous holding. There is thus no basis upon which a writ of certiorari could properly issue.

EZEKIEL G. STODDARD
ARNOLD M. LERMAN
1625 Eye Street, N. W.
Washington, D. C.
Attorneys for Respondent, California-Pacific Utilities Company

COX, LANGFORD, STODDARD & CUTLER
1625 Eye Street, N. W.
Washington, D. C.
Of Counsel

APPENDIX A

Secretary's Regulations of 1930 (As Amended)*

"V

The following allocation of energy is made: (The percentages stated being percentages of the total firm energy available) subject, however, to the conditions hereinafter stated:

Of Firm Energy

A. To the State of Nevada, for use in Nevada, not exceeding eighteen per centum (18%) of said total firm energy.

B. To the State of Arizona, for use in Arizona, not exceeding eighteen per centum (18%) of said total firm energy.

* * *

C. To the Metropolitan Water District of Southern California for pumping Colorado River water into and in its aqueduct for the use of such District within the following limits:

(1) Thirty-six per centum (36%) of said total firm energy, which shall be paid for whether taken or not; plus

(2) All secondary energy developed at the Boulder Dam power plant as provided in Article Fourteen (14) hereof; plus

(3) So much of the firm energy allocated to the States, the City and the Company as may not be in use by them . . ."

[Part C (1) originally read:

"(1) Not exceeding thirty-six per centum (36%) of said total firm energy; plus . . ."]

* * *

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* Appearing at B. 1113, with amendments as appearing in District contract, B. 352.

"D. To the municipalities of Anaheim, Beverly Hills, Burbank, Colton, Fullerton, Glendale, Newport Beach, Pasadena, Riverside, San Bernardino and Santa Ana (referred to here as 'the municipalities'), six per centum (6%) in all, to be allocated between them as they may agree; but if no agreement is submitted to the Secretary on or before April 15, 1931, the Secretary shall determine the allocation of each.

E. To the City of Los Angeles, Thirteen per centum (13%).

F. To Southern California Edison Company Ltd., the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company and the Los Angeles Gas and Electric Corporation, referred to herein as the companies, nine per centum (9%) in all, division whereof between the companies shall be made according to mutual agreement among them, if possible. If no such agreement is submitted to the Secretary on or before April 15, 1931, the Secretary shall determine the allocation of each.

It is further agreed that:

(i) So much of the energy allocated to the States (thirty-six per centum (36%) of the firm energy) and not in use by them, or failing their use, by the District for the above purposes, shall be taken and paid for one-half by the City and one-half by the Company.

In addition, all firm energy allocated to the City (thirteen per centum (13%)) shall be taken and paid for by the City.

(ii) All of the energy allocated to the municipalities may be contracted for in compliance with regulations of the Secretary, by any one or more of them, as they may agree, on or before April 15, 1931. So much of the energy allocated to the municipalities as is not so contracted for, or if contracted for, not used by them directly or under contract for municipal purposes and/or distribution to their inhabitants, shall be taken and paid for by the City.

(iii) So much of the energy allocated to the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company, and the Los Angeles Gas and Electric Corporation as is not firmly contracted for by them, severally, in compliance with regulations of the Secretary on or before April 15, 1931, shall be taken and paid for by the Company.

* * *

(v) Each of the States of Arizona and Nevada may, from time to time within the period of the aforesaid lease, contract for energy for use within such State in any amount until the total allocated respectively to each is in use as provided above; and may terminate such contract, or contracts, without prejudice to the right to again contract for such energy. All such contracts shall be executed with the Secretary. A contract requiring one thousand (1000) horsepower (of maximum demand) or less may become effective or be terminated on six months written notice of requirement or termination given the Director by the State; provided, that the notice given shall be two years if in the twelve months preceding said notice of demand the total increment to such state has exceeded five thousand (5000) horsepower of maximum demand or if in the twelve months preceding said notice of termination the decrement to such state has exceeded five thousand (5000) horsepower of maximum demand. In all cases the Director shall immediately transmit such notice to each lessee. Whenever the amount in use is in excess of five thousand (5000) horsepower of maximum demand, the lessees respectively shall be compensated for property rendered idle by use of such excess in such amount as the Secretary shall determine to be equitable. Firm energy not contracted for by the States shall be available for use by the District as herein elsewhere provided, and if not in use by the States and/or the District, shall be taken and paid for equally by the two lessees. No right which may be available to a State under section five (5) (c) of the Boulder Canyon Project Act to

execute a firm contract for electrical energy for use within the State shall be impaired by any provision of this contract.

Of Secondary Energy

It is further agreed that the District shall have the right to purchase and use all secondary energy as provided in Article nine (9) and Article fourteen (14) hereof for the purposes stated in the first paragraph of sub-division (C) of this Article. The City and the Company shall each have the right to purchase and use one-half of all secondary energy not used by the District. Any such energy not used by one lessee shall be available, for the time being, to the other. If secondary energy is not taken by the District, and City, and/or the Company then and in such event, the United States reserves the right to take, use and dispose of such energy, from time to time, as it sees fit, giving credit therefor as provided in Article twelve (12) of Exhibit "A" hereof.

Of Firm Energy Allocated to but not Used by the District

It is further agreed that in the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it for the only purpose for which said firm energy is allotted to it, that is, for pumping water into and in its aqueduct, then the Secretary shall dispose of such unused energy until required by the District for said purpose, crediting on the District's obligation the proceeds of such disposition as received; provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to a successor to the District which may undertake to build or maintain a Colorado River Aqueduct the opportunity to take said firm energy for the same purpose and under the same terms as those to which the District was obligated; and provided further that in the event no such successor takes said firm energy as provided above, then no disposition of such firm energy shall be made by the Secretary without first giving to each lessee the opportunity to contract on equal

terms and conditions, to be prescribed by the Secretary, for one-half of such energy, together with such portion of the remainder as the other lessee shall not elect to take."

[This section originally read:

"*Of Firm Energy Allocated to but Not Used by the District*

In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it for the only purpose for which said firm energy is allotted to it, that is, for pumping water into and in its aqueduct, then no disposition shall be made of such firm energy by the Secretary without first giving to a successor to the District which may undertake to build or maintain a Colorado River Aqueduct the opportunity to take said firm energy for the same purpose and under the same terms as those to which the District was obligated.

In the event no such successor takes said firm energy as provided above, then no disposition of such firm energy shall be made by the Secretary without first giving to each lessee the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for one-half of such energy, together with such portion of the remainder as the other lessee shall not elect to take."]

APPENDIX B

Boulder Canyon Project Act

SECTION 4(b)

"Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this act."

SECTION 5

"That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

"After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

"General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

"(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

"Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

"(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

"(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

"The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however*, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

"(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary,

from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

"The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy."

APPENDIX C

Federal Water Power Act

SECTION 14 (16 USC § 807) "Notice—Compensation—Values Excluded—Rights Restricted to Cost—Condemnation"

"Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. . . ."

SECTION 15 (16 USC § 808) "Expiration of Licenses—Renewal—Conditions—Compensation"

"That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws

and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof:

Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 528

THE CITY OF LOS ANGELES, *Petitioner*,

v.

CITIZENS UTILITIES COMPANY and CALIFORNIA PACIFIC UTILITIES COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ROGER ARNEBERGH,
City Attorney,

GILMORE THELMAN,
Chief Assistant City Attorney for Water and Power,

JOHN H. MATHEWS,
Deputy City Attorney,
207 South Broadway,
Los Angeles 12, California,

NORTHCUTT ELY,
Special Counsel,
1200 Tower Building
Washington 5, D. C.

Attorneys for Petitioner

ELY, MCCARTY AND DUNCAN
ROBERT L. MCCARTY
C. EMERSON DUNCAN, II
CHARLES F. WHEATLEY, JR.
1200 Tower Building
Washington 5, D. C.

Of Counsel

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THE CITY OF LOS ANGELES, *Petitioner*,

v.

CITIZENS UTILITIES COMPANY and CALIFORNIA PACIFIC UTILITIES COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The City of Los Angeles joins the United States in praying that a writ of certiorari issue to review the judgments of the United States Court of Claims entered in the above cases on March 6, 1957.

OPINION BELOW

The opinion of the Court of Claims is reported in 149 Federal Supplement, at page 158, attached hereto as Appendix B, *infra*, pp. 14a-22a.

JURISDICTION

The judgments of the Court of Claims were entered on March 6, 1956, (Appendix B, *infra*, pp. 14a-22a). Petitions for rehearing were denied by that Court on June 5, 1957, (Appendix C, *infra*, p. 23a). By Order of Mr. Justice Harlan dated August 29, 1957, the time was extended in which petitioner could file for a writ of certiorari until and including October 3, 1957 (Appendix D, *infra*, p. 24a). The jurisdiction of the Court is invoked under 28 U.S.C., Section 1255.

QUESTION PRESENTED

Pursuant to the Boulder Canyon Project Act and Boulder Canyon Project Adjustment Act, the Secretary of the Interior allocated all of the firm energy to be generated at Hoover Dam from 1937 until 1987 among nine allottees who contracted to pay therefor the rates required to meet all costs and repay the Government's investment with interest during that fifty year period. As an accommodation to one allottee which was unable, during its load-building phase, to use all the energy for which it was paying, the Secretary resold, for that allottee's account, a portion of its unused energy to the respondents for a term of fifteen years under contracts which contained no provision for renewal. Do the provisions of the Boulder Canyon Project Act and Boulder Canyon Project Adjustment Act require the United States, upon expiration of these resale contracts, to renew them to 1987 as obligations of the Government, notwithstanding its contracts allocating the same energy to others, or pay damages for failing to so renew?

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Boulder Canyon Project Act, 45 Stat. 1057 (43 U.S.C., 617 et seq.), the Boulder Canyon Project Adjustment Act, 54 Stat. 744 (43 U.S.C. 618 et seq.) and of the Regulations adopted pursuant thereto are set out in Appendix A, *infra*, pp. 1a-13a.

STATEMENT

The Boulder Canyon Project Act (Act of December 21, 1928, 45 Stat. 1057) authorized the Secretary of the Interior to construct a dam (now known as Hoover Dam) and power plant, but only on condition (Sec. 4(b)) that in advance of construction he obtain contracts for sale of power adequate to return all costs, with interest on the Government's investment, within fifty years. The statute (Sec. 5) directed the Secretary to contract only with purchasers who would meet these revenue requirements, giving preference, in event of conflicting applications, to public agencies. This was done. He fixed a time within which applications must be submitted. (Respondents did not apply.) The Secretary thereafter, by regulations, allocated 100 per cent of the firm energy to be generated for fifty years as follows: Nine per cent to privately-owned utilities, to be underwritten by Southern California Edison Company, nineteen per cent to municipalities, to be underwritten by the City of Los Angeles, thirty-six per cent to the Metropolitan Water District of Southern California for pumping water into and in its Colorado River Aqueduct, eighteen per cent to Arizona, eighteen per cent to Nevada. The allocations to the two States were options. All others were firm commitments, to be paid for whether used or not, and, in addition, Los Angeles and the Edison Company were re-

quired, in equal shares, to take the power allocated to Arizona and Nevada if not contracted for by those States. Los Angeles, the Edison Company, and the District thus became liable for 100 per cent of the firm energy. Los Angeles and the Edison Company were given options, in equal shares, on any unused District energy, but were not obligated to buy it.

Contracts were executed by the Secretary on this basis in 1930 with Los Angeles, the Edison Company, and Metropolitan Water District, and were reported to Congress.[1] Appropriations in reliance thereon were made and the dam and power plant completed June 1, 1937. The fifty year contract period thus ends May 31, 1987.

The largest block of firm power, 36 per cent, was allocated to the Metropolitan Water District, but limited to use for pumping Colorado River water into and in its aqueduct from that river some 240 miles to the coastal plain. As this full quantity would not be needed for that purpose during the aqueduct's load-building period (the aqueduct began operation in 1940 and is expected to reach full load about 1970), the 1930 contracts authorized the Secretary, if requested by the District, to sell for the District's account its temporarily unused energy, but gave the City and Edison Company the first right to purchase it.[2] The District re-

[1] The allocation pattern was completed by contracts made in 1931 with Pasadena, Glendale, Burbank, Los Angeles Gas and Electric Corporation and the predecessor of California Electric Power Company. The City of Los Angeles subsequently acquired the properties and allocation of Los Angeles Gas and Electric Corporation.

[2] The California Electric Power Company succeeded to a part of the Edison commitment.

mained liable for the full amount, subject to any credits thus received.

Between 1938 and 1945 a number of such Metropolitan resale contracts were made by the Secretary with third parties, all for relatively short fixed terms, none for fifty years. Among them were the two contracts with respondents, made in 1938, for a fifteen-year period expiring, in terms, December 31, 1954, and, like all the resale contracts, containing no provision for renewal. (Citizens Utilities Company, operating in Arizona, did not seek a share of Arizona's 18 per cent allocation.)

The Boulder Canyon Project Adjustment Act (Act of July 19, 1940, 54 Stat. 774) authorized the Secretary of the Interior to effect a rate reduction at Hoover Dam, replacing the rate base established by the Project Act (which was related to the competitive cost of steam-generated power, and which was producing revenues considerably in excess of the costs which the Secretary was required to recover by section 4(b) of the Project Act) with a rate base related primarily to amortization of the Government's investment with interest, plus operation, maintenance, and certain surcharges not important here. The new act directed that new contracts be made and all existing contracts be cancelled, as a condition to obtaining the new and more favorable rates. This was done. But section 12 provided:

> "'Firm energy' and 'allottees' shall have the meaning assigned to such terms in regulations heretofore promulgated by the Secretary and in effect at the time of enactment of this Act: . . ." (Sec. 12, 54 Stat. 788, 43 U.S.C. 618k)

By regulations dated May 20, 1941, the Secretary allocated 100 per cent of the firm energy for the period

ending May 31, 1987, to allottees named in the 1930 allocation: the States of Arizona and Nevada, Metropolitan Water District, Los Angeles, Pasadena, Glendale, and Burbank, Southern California Edison Company, and California Electric Power Company.[3] As before, the unused Metropolitan energy was required to be offered to the City of Los Angeles, Edison Company, and California Electric Power Company before resale to others. The present plaintiffs, California Pacific and Citizens Utilities, were not named as allottees. The nine allottees made the required firm contracts in 1941, expiring May 31, 1987 (fifty years from the completion of Hoover Dam), with an express right of renewal at that time "upon such terms and conditions as may be authorized or required under the then existing laws and regulations", unless the property "dependent for its usefulness on a continuation of this contract be purchased or acquired", etc. Upon underwriting the project as required by the 1940 Adjustment Act, their old contracts were terminated, and the Secretary proclaimed the new act in effect.

This resulted in a voluntary rate reduction to the respondents. By new contracts with the Secretary made in 1941, under the Adjustment Act, with Metropolitan Water District's assent, respondents' 1938 contracts were cancelled and the new rates were made applicable to the energy for which they paid and for which the District received credit. The new contracts, like the old, specified December 31, 1954, as their ex-

[3] The 1930 allocations were in whole percentages, e.g., 18%, of 4,240,000,000 kwh. per year. The 1941 allocations are for the same quantities of energy but in lesser percentages, e.g., 17.6259%, because stated in percentages of 4,330,000,000 kwh., in consequence of an increase in the height of the dam.

piration date and, like the old, contained no provisions for renewal, or for compensation if not renewed. The respondents were not obligated to 1987 by these contracts, indeed not at all beyond 1954. Their contracts were primarily options, the obligations amounting in each case to only about one-seventh of the optioned quantity. They were in no sense fifty year underwriting contracts, as described in the Project Act or Adjustment Act, and as executed by the nine allottees.

It is upon these two 1941 contracts that respondents sued below in the Court of Claims, in consequence of the following events:

By a multi-partied contract dated May 31, 1945, the City of Los Angeles, Southern California Edison Company, and California Electric Power Company agreed to buy and the Secretary agreed to sell all unused District energy not previously sold, for the full statutory amortization period ending May 31, 1987; all obligations of the Reconstruction Finance Corporation (which had been buying unused District energy for war plants) were ended; and the District approved.[4]

On December 31, 1954, the respondents' two contracts expired.[5] They demanded renewal to May 31, 1987. The Secretary of the Interior refused. They thereupon brought these actions for damages against the

[4] On May 31, 1957, the District notified the purchasers under the 1945 contract that after May 31, 1959, no unused energy will be available.

[5] Until December 31, 1954, respondents received all the power they demanded. During the fifteen years that these contracts were in force, 1938-1954, the two respondents were obligated to take about 1067 million kilowatt hours annually, had an option on 70 million per year, and, in fact, used an average of about 30 million annually.

United States, claiming about $17,000,000. The United States impleaded the City, District, Edison Company, and California Electric Power Company as third parties.[6]

Respondents, notwithstanding the expiration date of their contracts, December 31, 1954, and the absence of any contractual provision for renewal, assert that they have a built-in statutory right of renewal arising from section 5 (b) of the Boulder Canyon Project Act. Section 5 provides, *inter alia*:

> "Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated

[6] Rule 19 of the Court of Claims provides:

"Rule 19. Third-Party Practice.

(a) When Third Parties May Be Brought In: The Court on its own motion or on the motion of either party may (1) notify any and all persons with legal capacity to sue and be sued and who appear to have an interest in the subject matter of any pending suit to appear as a party or parties and assert their interest therein; or (2) on motion of the Attorney General may summon any such third person or persons against whom the United States may be asserting a claim or contingent claim for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of the suit to appear as a party or parties and defend their interest, if any, in such suit. Such motion if made by plaintiff shall be filed at the time the petition is filed; if made by the United States, it shall be filed on or before the date on which it is required to answer."

at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

* * *

"General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

* * *

"(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

"(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act[7] as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona,

[7] Section 7 of the Federal Water Power Act (Federal Power Act, 16 U.S.C. 800) provides:

"§ 800. Preferences in issuance of preliminary permits or licenses

"(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plan."

> California, and Nevada shall be given equal opportunity as such applicants.
>
> * * *
>
> "The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy."

On these facts, the Court of Claims held (Opinion, p. 9, Appendix B, *infra*, p. 22a):

> "Our conclusion is that the plaintiffs were entitled, under the statute, to renewals of their contracts with the limitations which they concede,[8] and that the Government violated their statutory rights when it denied them renewals and refused to give them the electrical energy to which renewals of their contracts would have entitled them."

REASONS FOR GRANTING THE WRIT

1. The decision below imposes a permanent contractual obligation upon the United States not authorized by the Boulder Canyon Project Act or the Boulder Canyon Project Adjustment Act.

A. The respondents' contention, in essence, is that, since the Metropolitan Water District has the statutory right to demand in 1987 the renewal, commencing then, of a contract which will expire at that time, respond-

[8] "There is an apparent inconsistency in the position of the plaintiffs, in that they do not claim that their rights, under their renewals, would be as extensive as their rights under their original contracts. The plaintiffs claim only the rights to renewals which would have given them such electricity, if any, as was surplus to Water District's needs after 1951, and was within the amounts set in their original contracts." (Opinion, pp. 8-9; Appendix B, *infra*, pp. 21a-22a.)

ents had a statutory right to demand in 1954, commencing then, the renewal of a contract, expiring in that year, which entitled them to buy a portion of the District's allocation. This right of renewal is asserted by respondents (so far) for a period which expires on May 31, 1987, not a period which commences on that date. The effect of this contention, if sustained, is to require the Secretary to furnish energy to eleven allottees, instead of the nine named in his regulations. Moreover, if respondents' contracts in the present action acquire a status valid for fifty years instead of fifteen, the right to renew them will presumably be asserted again in 1987. The temporary District resale contracts, made for that District's accommodation, would thus unexpectedly be converted into Government obligations for an added 33 years, and perhaps permanently, against the will of the United States, to serve contractors not selected by the Secretary.

B. Congress, in enacting the Boulder Canyon Project Adjustment Act in 1940, relied upon the credit of nine allottees who undertook a firm obligation for 100 per cent of the firm energy for fifty years. In authorizing lower rates which gave up the former margins of safety, and would amortize the Government's investment in Hoover Dam only if all nine allottees paid all their power bills for all the firm energy, Congress stipulated (Sec. 12):

> "'Firm energy' and 'allottees' shall have the meaning assigned to such terms in regulations heretofore promulgated by the Secretary and in effect at the time of the enactment of this Act."

Congress knew nothing of these two self-styled allottees who were not bound for more than about 15 per

cent of the energy optioned to them at the District's behest, and not bound at all beyond fifteen of the required fifty years. These options, held by parties unknown to Congress, were not contracts of the firm quality required by the Adjustment Act of the nine allottees whose names were disclosed to Congress.

C. Manifestly, the Government, had it wanted to, could not have enforced these contracts beyond 1954. They were not fifty year firm contracts, as required by sections 4 (b) and 5 of the Boulder Canyon Project Act. The only contracts to which section 5 (b)'s right of renewal relates are the contracts referred to in the other paragraphs of section 5. The only contracts authorized by section 5 are those which produce revenues to the United States for fifty years as required by section 4 (b). Respondents' contracts are not for the statutory period of fifty years, are not for the statutory purpose of producing revenues for the United States, and they carry no statutory right of renewal. Had all nine allottees signed only fifteen year contracts with mere options to renew thereafter, such as those asserted by the respondents, the statutory conditions requiring fifty year firm contracts to assure repayment of the investment would not have been met, and Hoover Dam could not have been built. May the respondents, at their option, impose upon the United States implied obligations which the Secretary of the Interior could not have lawfully assumed for the United States, if their terms had been explicit?

D. Respondents' contracts were not made for the benefit of the Government, but of the Metropolitan Water District. Money paid by the respondents for power is all credited to the amount firmly owed by the

District to the United States for power, whether the District uses such power or not. Respondents' payments add not one cent to the revenues of the United States. The United States sells for the accommodation of the District, reducing that allottee's burden. The District might as well have sold for itself, but for arrangements of convenience between it and the Government, which made the Secretary a clearing-house for all energy, but which are of no concern to respondents. The Secretary had no authority, and did not purport, to burden the Boulder Canyon Project with a permanent obligation arising from a temporary contract which produced no revenues for the United States.

2. The sound administration of the Boulder Canyon Project, particularly its distinguishing feature as a self-liquidating project, is imperiled by the rationale of the decision below.

A. Respondents' contracts obligate them to take only about 15 per cent of the energy which the Government must be prepared to furnish if demanded. This imposes greater financial burdens upon the project than does the Metropolitan Water District contract. The District's load, for pumping water, is relatively constant, with little fluctuation from hour to hour or day to day. The investment in generating equipment to meet such a load is at the minimum. By contrast, if respondents have acquired a right to this power, they may demand from 15 per cent to 100 per cent of their optioned quantity, per year, to meet their utilities' load which may fluctuate from hour to hour, day to day, month to month. The Government's power generating investment is at a maximum to meet such a commitment, its energy revenues at a minimum.

B. Respondents assert an option good for fifty years on 70 million kilowatt hours per year, obtained by obligating themselves for less than a third of that time to pay for less than 15 per cent of that annual quantity—an over-all commitment to pay for less than 5 per cent of the aggregate number of kilowatt hours to which they now claim title. If the statute requires that result, then the same result could be demanded by a contractor who agreed to take one per cent of the optioned quantity for one year out of the fifty. The result decreed below is at total variance with the great distinction of Hoover Dam: the Boulder Canyon Project Act's insistence upon full self-liquidation, assured in advance by firm contracts. Respondents' options do not remotely resemble such contracts, carry none of their burdens, and imply none of their benefits.

3. The decision of the court below in renewing the contracts of the respondents (private power companies) directly violates the preference rights of the City of Los Angeles to the energy, as a public agency, both under its contract incorporating the Secretary's regulations and under the Boulder Canyon Project Act.

A. The City of Los Angeles is a public agency of the State of California, while both the respondents, the Citizens Utilities Company and the California-Pacific Utilities Company, are private corporations. The Boulder Canyon Project Act, Section 5 (c), provides:

> "In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act as to conflicting applications for permits and licenses. . . ." (Appendix A, *infra*, p. 3a.)

Section 7 of the Federal Power Act provides in such a case that public agencies shall be preferred:

> (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans." (16 U.S.C.A. 800)

In 1930, when the Secretary invited bids for Hoover power, a number of public and private applicants appeared. The Secretary, then faced with a choice among "conflicting applications" allocated a total of 91 per cent of the firm energy to States and other public agencies, including the City. He allotted only 9 per cent to the private companies. Had the respondents appeared as applicants then, their share if any, would had to have come out of the 9 per cent allocated for private companies. But decision of the court below, in elevating the respondents to the status of permanent allottees by giving them a statutory right of renewal, has reversed the Secretary's determination as to public power allocations required by the act. The City, as a public

agency, is entitled to the preference protection afforded by Congress in that act.

B. In 1937 when the respondents first sought Hoover power, the released unused power of the District, for the period ending December 31, 1954, was only offered to them after having first been offered to the City of Los Angeles and the named private allottees. The Secretary concluded he was bound to so offer the power to the City and the other named allottees because of the preference right to these parties expressly given in his general regulations of 1930 (Appendix A, *infra*, p. 10a). This preference right is now clearly expressed in the current 1941 regulations, under which all the present contracts were negotiated, as follows:

> "(iv) In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it, then the Secretary shall dispose of such unused energy until required by the District, crediting on the District's obligation the proceeds of such disposition as received; *provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to the City, the Company and the Nevada-California Electric Corporation the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for such energy,* in the same proportion, and subject to the same rights with respect to proportions thereof not taken by others, as in the case of secondary energy. The rights of the City, the Company and The Nevada-California Electric Corporation so to contract shall be deemed to have been waived unless, within 30 days after offer by the Secretary of such opportunity, such offer is accepted." (Art. 4b(iv); Appendix A, *infra*, p. 13a.) (Emphasis supplied.)

Under this clause of the regulations, if unused District power were available on January 1, 1955, the

City and the other named allottees would rightfully have a preference to it. They have not waived their right thereto beyond December 31, 1954. The renewal by the court below was in direct conflict with the regulations.

Further, in 1945, the City and the other named allottees exercised their preference. By contract of May 31, 1945, between the City, and the other allottees named in the preference regulation above, *all* of the unused firm power of the District was taken by the City and the named allottees for the whole period ending May 31, 1987. (*Hoover Dam Power and Water Contracts* (1950) p. 1061; Government Exhibit 1.) The contract in Article 5 specifically referred to the outstanding resale contracts of the respondents, thus making it clear that the energy covered thereby would go to the preference holders upon their expiration on December 31, 1954. The court below expressly declined to decide the City's and other preference holders' rights under the 1945 contract, thus leaving the United States in the position, if the judgment below stands, of having sold the same power twice, to different parties.

4. This Court should grant certiorari because of the importance of the issue decided in the continued administration of the Boulder Canyon Project Act.

A. In granting a statutory right of renewal to the holder of a contract for energy temporarily unused and put up for resale through the clearing agency of the Secretary of the Interior by the original allottee owner, the decision below challenges all freedom of contract on the part of the allottees in conjunction with the Secretary to enter any temporary "term" contracts

for the sale of electric energy, regardless of the desirability of such contracts. The allottees are thus saddled with the burden of being unable to make any temporary commitments for resale, for any such commitment, under the ruling below, becomes a permanent allocation. The effect is to impede the allottees and the Secretary from taking any steps to mitigate the allottees' strict financial obligations under their contracts to underwrite the federal investment in the Boulder Canyon Project, when, under any one of a myriad of changing economic conditions, it might be necessary to do so.

The result of the decision below is bound to reflect adversely on the repayment structure of the project. It should not be left as the "law of the river" to straitjacket all future administration of the Project Act.

B. The Project Act only assures a right of renewal as of 1987, upon terms then prescribed by law, and requires that such renewals conform to general and uniform regulations. The right of renewal asserted here does not meet any of those statutory conditions. It is asserted 33 years in advance of 1987; no regulations exist which control renewals, either as to rates, duration, or any other matter; and no one knows what laws Congress may enact governing such renewals.

CONCLUSION

The decision below misconstrues the Boulder Canyon Project Act in a way to embarrass the sound financial administration of Hoover Dam's power operations. In view of the public importance of that project and the historic significance of the Boulder Canyon Project Act, particularly in the field of water resource finance-

ing here affected, certiorari should issue to review that decision.

Respectfully,

ROGER ARNEBERGH,
City Attorney,
GILMORE TILLMAN,
Chief Assistant City Attorney for Water and Power,
JOHN H. MATHEWS,
Deputy City Attorney,
207 South Broadway,
Los Angeles 12, California.

NORTHCUTT ELY,
Special Counsel,
1200 Tower Building
Washington 5, D. C.
Attorneys for Petitioner

ELY, MCCARTY AND DUNCAN
ROBERT L. MCCARTY
C. EMERSON DUNCAN, II
CHARLES F. WHEATLEY, JR.
1200 Tower Building
Washington 5, D. C.
Of Counsel

APPENDIX A

Section 4(b) of the Boulder Canyon Project Act of 1928, 43 U.S.C. 617c, 45 Stat. 1058, provides as follows:

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this act.

Section 5 of the Boulder Canyon Project Act of 1928, 43 U.S.C. 617d, 45 Stat. 1060, provides as follows:

That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate

fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for.

In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act[*] as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however*, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary,

* Section 7 of the Federal Power Act, 16 U.S.C.A. 800 provides as follows:

(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

Regulation V of the Secretary of the Interior for the lease of power at the Boulder Canyon Project, April 25, 1930, provides as follows:

V

The following allocation of energy is made: (the percentages stated being percentages of the total firm energy available) subject, however, to the conditions hereinafter stated:

Of Firm Energy

A. To the State of Nevada, for use in Nevada, not exceeding eighteen per centum (18%) of said total firm energy.

B. To the State of Arizona, for use in Arizona, not exceeding eighteen per centum (18%) of said total firm energy.

Should either of the States not take its full eighteen per centum (18%) allocation within a period of twenty (20)

years hereof, the other may then contract for the energy not so taken up to four per centum (4%) of the total firm energy, provided that the combined amount used by the two states shall not, at any time, exceed thirty-six per centum (36%) of such total firm energy.

C. To the Metropolitan Water District of Southern California (hereinafter referred to as the District) so much energy as may be needed and used for pumping Colorado River Water into and in its Aqueduct for the use of such District within the following limits:

(1) Not exceeding thirty-six per centum (36%) of said total firm energy; plus

(2) All secondary energy developed at the Boulder Dam power plant as provided in these regulations; plus

(3) So much of the firm energy allocated to the States, the City and the Company as may not be in use by them. Energy allocated to the States but not in use by them shall be released to the District by the two lessees equally (unless they agree upon a different ratio) as follows:

(a) If the District makes a firm contract with the Secretary for the balance of the lease period for part or all of such unused States energy (subject to the first right of the States thereto) such contract shall be made effective upon two years' written notice to the Secretary, and compensation to the lessees, respectively, for main transmission line property rendered idle;

(b) If the District does not so make a firm contract for such energy, then energy allocated to the States but not in use by them, shall be released to the District upon not less than fifteen (15) months' written notice to the Secretary and at such compensation as the District and such lessees, respectively, may agree upon, to cover cost and overhead of replacing energy which otherwise would have been received at the Pacific Coast end of the main transmission lines by the lessees, respectively. Such cost shall include interest on and depreciation and operation and maintenance of the plant capacity while required for the generation of such substitute energy; and also appropriate allowance for interest on and maintenance and depreciation of plant capacity rendered idle because of cessation of generation of such substitute energy until such time

as such plant capacity would otherwise have been installed by the lessees, respectively, for their own requirements. If the District and the respective lessees fail to agree on such compensation, such energy shall nevertheless be released to the District, and the disagreement shall be determined by arbitration or as may be provided in the respective contracts of the parties with the Secretary. Such determination shall include allowance for items of cost and overhead as specified in this paragraph. Pending such determination, energy so released shall be paid for by the District at the rate for firm energy but the determination of compensation shall not be controlled by such rate. During any year beginning June first, the District shall not use any secondary energy nor any unused State energy, until it has first used subsequent to June first, next preceding, an amount of firm energy equivalent to one-twelfth of the amount of firm energy it is obligated to take and/or pay for annually multiplied by the number of months elapsed since June first next preceding.

(4) If, due to temporary deficiency in secondary energy regularly used by the District substitute energy is requested by the District in excess of the energy made available under the foregoing sub-paragraph (3) (b) the City and/or the Company may release so much energy as may be practicable on the same terms as provided in sub-section (3) (b) preceding.

D. To the municipalities of

	Percent
Pasadena	1.6183
Glendale	1.8867
Burbank	.5896
Total	4.0946

(NOTE—Amendments of March 10, 1931 and July 1, 1931, extended the date for submission of an allocation to July 15 and November 16, 1931, respectively. An agreement having been submitted to the Secretary whereby only the above municipalities elected to contract, in the amounts above stated, and the other municipalities named in regulations of April 25, 1930, i.e., Anaheim, Beverly Hills, Colton, Fullerton, Newport Beach, Riverside, San Bernardino and Santa Ana, withdrew, the allocation under

subsection D is amended as above, effective November 16, 1931.)

E. To the City of Los Angeles, 14.9054% (being 13% as provided in regulations of April 25, 1930, plus 1.9054%, which is the balance of 6% allocated the municipalities by regulations of said date and not applied for by them pursuant to subsection D as amended).

(NOTE—Amended as above, effective November 16, 1931. See note under subsection D.)

F. To

	Percent
Southern California Edison Co. Ltd.	7.2
Southern Sierras Power Co.	.9
Los Angeles Gas & Electric Corp.	.9

(NOTE—Amended as above, effective November 16, 1931, to accord with allocation agreement submitted pursuant to subsection F a promulgated in regulations of April 25, 1930, time having been extended to July 15, 1931 by amendment of March 10, 1931, and to November 16, 1931 by amendment of July 1, 1931.)

The foregoing allocations are subject to the following conditions:

(i) So much of the energy allocated to the States (thirty-six per centum (36%) of firm energy) and not in use by them, or, failing their use, by the District for the above purposes, shall be taken and paid for one-half by the City and one-half by the following allottees in the ratio stated below:

	Percent
Southern California Edison Co. Ltd.	80
Los Angeles Gas and Electric Corp.	10
Southern Sierras Power Co.	10

(NOTE—Amended as above, effective November 16, 1931, to accord with an allocation agreement submitted in accordance with subsection F as promulgated in regulations of April 25, 1930, time having been extended to July 15, 1931 by amendment of March 10, 1931, and to November 16, 1931 by amendment of July 1, 1931.)

(ii) So much of the energy allocated to the municipalities by regulations of April 25, 1930 (6%) as has been relinquished by them (1.9054%), and so much of the energy contracted for by them (4.0946%), as is not used by them directly or under contract for municipal purposes and/or distribution to their inhabitants, shall be taken and paid for by the City (without, however, impairing the obligation of said municipalities to the United States to take and pay for energy contracted for by them, respectively).

(NOTE—Amended as above, effective November 16, 1931, to accord with an allocation agreement and elections thereunder submitted in accordance with subsection D. See note under subsection D.)

(iii) So much of the energy allocated to the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company, and the Los Angeles Gas and Electric Corporation by regulations of April 25, 1930, as has not been or is not contracted for by them shall be taken and paid for by the Southern California Edison Company, Ltd.

(NOTE—Amended as above, effective November 16, 1931.)

(iv) If any allottee is permitted by the United States to divert water from the reservoir at a time when the reservoir is not spilling, in consequence of which the amount of energy which would have been utilized is diminished, such diminution, to such extent as may be provided in the contract, shall be debited to the allocation of firm energy herein made to such allottee; and charge for the energy equivalent of such diversion shall be made, and the amount of energy which the allottee shall otherwise be obligated to take and pay for hereunder shall be correspondingly reduced.

The reservoir shall be considered as spilling whenever water is being discharged in excess of the amount used for the generation of power, whether such waste occurs over the spillway or otherwise.

(v) Each of the States of Arizona and Nevada may, from time to time within the period of the aforesaid lease, contract for energy for use within such State in any amount until the total allocated, respectively, to each is in use as provided above; and may terminate such contract, or

contracts; without prejudice to the right to again contract for such energy. All such contracts shall be executed with the Secretary. A contract requiring one thousand (1,000) horsepower (of maximum demand) or less may become effective or be terminated on six months' written notice of requirement or termination given the Director by the State; provided, that the notice given shall be two years if in the twelve months preceding said notice of demand the total increment to such State has exceeded five thousand (5,000) horsepower of maximum demand or if in the twelve months preceding said notice of termination the decrement to such State has exceeded five thousand (5,000) horsepower of maximum demand. In all cases the Director shall immediately transmit such notice to each lessee. Whenever the amount in use is in excess of five thousand (5,000) horsepower of maximum demand, the lessees and other allottees respectively shall be compensated for property rendered idle by use of such excess in such amount as the Secretary shall determine to be equitable.

Firm energy not contracted for by the States shall be available for use by the District as herein elsewhere provided, and if not in use by the States and/or the District, shall be taken and paid for one-half by the City and one-half as follows: By the Southern California Edison Company, Ltd., 80% of said one-half; by the Southern Sierras Power Co., 10% of said one-half; and by the Los Angeles Gas and Electric Corporation, 10% of said one-half.

(NOTE.—Amended as above, effective November 16, 1931, to accord with an allocation agreement submitted pursuant to sub-section F; see note thereunder. Also, regulations of April 25, 1930, provided for contingencies in event a State should make a firm contract under section 5c of the Boulder Canyon Project Act in lieu of accepting the allocation therein made. As the time for execution of such a firm contract under section 5c of that act has expired by the limitation stated in the act the balance of this paragraph as originally promulgated is revoked, effective November 16, 1931.)

Of Secondary Energy

The District shall have the right to purchase and use all secondary energy as provided in these regulations for the purposes stated in the first paragraph of subdivision C of

this article. The City shall have the right to purchase and use one-half, and the allottees named in subsection F shall have the right to purchase and use a total of one-half (in the proportions in which they share the obligations assumed under subsection "v" as to unused State allocations) of such secondary energy as is not used by the District. Any such energy not used by one lessee shall be available, for the time being, to the other. To the extent that secondary energy is not taken as aforesaid, then and in such event, the United States reserves the right to take, use and dispose of such energy, from time to time, as it sees fit, giving credit therefor as provided in these regulations.

(NOTE—Modified as above, effective November 16, 1931, an allocation agreement having been submitted by the allottees named in subsection F whereby the obligation of the Southern California Edison Co., Ltd., under subsection "v", and its conditional rights to secondary energy under this paragraph, were both shared in the same ratio as the allocation of firm energy among them under subsection F. See note under subsections F and "v.")

Of Firm Energy Allocated to but Not Used by the District

In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it for the only purpose for which said firm energy is allotted to it, that is, for pumping water into and in its aqueduct, then no disposition shall be made of such firm energy by the Secretary without first giving to a successor to the District which may undertake to build or maintain a Colorado River Aqueduct the opportunity to take said firm energy for the same purpose and under the same terms as those to which the District was obligated.

In the event no such successor takes said firm energy as provided above, then no disposition of such firm energy shall be made by the Secretary without first giving to each lessee the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for one-half of such energy, together with such portion of the remainder as the other lessee shall not elect to take.

Of Firm Energy not Disposed of In the Foregoing Allocations

In case the dam which the United States erects provides a maximum water surface elevation in excess of one thousand two hundred twenty-two (1,222) feet above sea level (United States Geological Survey datum), and thereby increases the quantity of firm energy above the quantity of four billion two hundred forty million (4,240,000,000) kilowatt-hours allocated above, said additional firm energy shall be generated, taken and paid for by the City on the same terms and conditions as other firm energy under its contract, but without prejudice to the foregoing allocations or to the contractual rights of other allottees.

(NOTE.—Regulations promulgated April 25, 1930, reserved to the Secretary the right to contract with any municipality for this additional energy on or before April 15, 1931, and provided that energy not so contracted for should be taken and paid for by the City. This time was extended to July 15, 1931 by amendment of March 10, 1931, and to November 16, 1931 by amendment of July 1, 1931. No such contract having been applied for, this subsection is amended as above, effective November 16, 1931.)

Section 1 of the Boulder Canyon Project Adjustment Act of 1940, 43 U.S.C. 618, provides as follows:

That the Secretary of the Interior is hereby authorized and directed to, and he shall, promulgate charges, or the basis of computation thereof, for electrical energy generated at Boulder Dam during the period beginning June 1, 1937, and ending May 31, 1987, computed to be sufficient, together with other net revenues from the project, to accomplish the following purposes:

(a) To meet the cost of operation and maintenance, and to provide for replacements, of the project during the period beginning June 1, 1937, and ending May 31, 1987;

(b) To repay to the Treasury, with interest, the advances to the Colorado River Dam Fund for the project made prior to June 1, 1937, within fifty years from that date (excluding advances allocated to flood control by section 2 (b) of the Project Act, which shall be repayable as provided in section 7 hereof), and such portion of such advances made

on and after June 1, 1937, as (on the basis of repayment thereof within such fifty-year period or periods as the Secretary may determine) will be repayable prior to June 1, 1987 . . .

* * * * * * * * * *

Section 8 of the Boulder Canyon Project Adjustment Act of 1940, 43 U.S.C. 618g, 54 Stat. 777, provides as follows:

The Secretary is hereby authorized from time to time to promulgate such regulations and enter into such contracts as he may find necessary or appropriate for carrying out the purposes of this Act and the Project Act, as modified hereby, and, by mutual consent, to terminate or modify any such contract: *Provided, however,* That no allotment of energy to any allottee made by any rule or regulation heretofore promulgated shall be modified or changed without the consent of such allottee.

Section 11 of the Boulder Canyon Project Adjustment Act of 1940, 43 U.S.C. 618j, 54 Stat. 778, provides as follows:

Any contractor for energy from the project failing or refusing to execute a contract modifying its existing contract to conform to this Act shall continue to pay the rates and charges provided for in its existing contract, subject to such periodic readjustments as are therein provided, in all respects as if this Act had not been passed, and so far as necessary to support such existing contract all of the provisions of the Project Act shall remain in effect, anything in this Act inconsistent therewith notwithstanding.

Regulation 4 of the 1941 General Regulations for Generation and Sale of Power in Accordance with the Boulder Canyon Project Adjustment Act provides in part as follows:

4. ALLOCATION OF ENERGY

(a) *Firm energy*

Firm energy shall be allocated as follows:

Allottee	Percentage	Use by allottee restricted to following
State of Nevada	17.6259	In Nevada only.
State of Arizona	17.6259	In Arizona only.
Metropolitan Water District of Southern California (hereinafter called the District).	35.2517	Pumping Colorado River water into and in its aqueduct.
City of Burbank	.5773	
City of Glendale	1.8475	
City of Pasadena (the three last above-named cities are hereinafter called the "municipalities").	1.5847	
City of Los Angeles	17.5554	
Southern California Edison Company Ltd.	7.0503	
The Nevada-California Electric Corp.	.8813	
	100.0000	

(iv) In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it, then the Secretary shall dispose of such unused energy until required by the District, crediting on the District's obligation the proceeds of such disposition as received; provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to the City, the Company and The Nevada-California Electric Corporation the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for such energy, in the same proportion, and subject to the same rights with respect to proportions thereof not taken by others, as in the case of secondary energy. The rights of the City, the Company and The Nevada-California Electric Corporation so to contract shall be deemed to have been waived unless, within 30 days after offer by the Secretary of such opportunity, such offer is accepted.

APPENDIX B

Opinion of the Court of Claims Dated March 6, 1957

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 6, 1957)

No. 364-55

CITIZENS UTILITIES COMPANY v. THE UNITED STATES

CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES

No. 381-55

CALIFORNIA-PACIFIC UTILITIES COMPANY v. THE UNITED STATES

CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES

Mr. Arthur S. Friedman, for the plaintiff in No. 364-55. *Messrs. Milton S. Gould, Ellis Lyons*, and *Gallop, Climenko & Gould* were on the briefs.

Mr. Ezekiel G. Stoddard, for the plaintiff in No. 381-55. *Messrs. Arnold M. Lerman* and *Cox, Langford, Stoddard & Cutler* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant. *Messrs. Francis J. Robinson* and *Gerson B. Kramer* were on the brief.

Mr. John H. Mathews for the City of Los Angeles. *Messrs. Roger Arnebergh, Gilmore Tillman*, and *Ely, McCarty and Duncan* were on the brief.

Mr. Edmund L. Jones for the Southern California Edison Company. *Messrs. Arthur J. Phelan, Paul R. Con-*

nolly, Bruce Renwick, and *Harry W. Sturges, Jr.* were on the brief.

Mr. Edmund L. Jones for California Electric Power Company. *Messrs. Henry W. Coil* and *Donald J. Carman* were on the brief.

Mr. James H. Howard for The Metropolitan Water District of Southern California. *Messrs. Donald M. Keith* and *John W. Dickey* were on the brief.

ON DEFENDANT'S AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiffs sue the United States for damages because the United States refused to renew their contracts for electrical energy produced at the Hoover Dam on the Colorado River. The two suits have been consolidated since they involve the same isues. The four "third parties" were brought into the case on notices, requested by the United States and issued by the court pursuant to its Rule 19. The facts in the cases appear from undisputed documents, and the cases are suitable for decision on motion for summary judgment.

The Boulder Canyon Project Act, 45 Stat. 1057, enacted in 1928, authorized the construction and operation of Boulder Canyon Dam and related facilities. But the Act required that, before any appropriations were made or any construction was commenced, the Secretary of the Interior should obtain contracts which would bring the United States enough revenue to repay it, with interest, within 50 years, the money proposed to be advanced by the United States for the construction of the dam, together with all expenses of operation and maintenance. The Secretary on April 26, 1930, entered into a contract with the City of Los Angeles and Southern California Edison Company, Ltd., hereinafter called, respectively, City and Edison, which are two of the third parties in this suit. Under this contract City and Edison were made, severally, lessees of parts of the proposed dam and the power plant machinery, their two parts constituting the whole, and they were obligated to generate, at cost, electrical energy for themselves and for others with whom contracts would be made. City and Edison also agreed to be responsible for paying for 64 percent of the energy

produced at the dam, subject, however, to the rights of the States of Arizona and Nevada to take large amounts of this 64 percent allotment when and if they so desired, and subject to the rights of several municipalities in Southern California to take 6 percent of this allotment if they made contracts to do so within a specified time. The allotments of City and Edison, amounting in all to 64 percent, were several, but the detailed percentages of their obligations are not relevant here. But they were obliged, between them, to take and/or pay for all of the 64 percent if no other entity exercised its option to take a part of it.

The Secretary of the Interior reported to Congress that the City-Edison contract was sufficient by itself to provide revenues to pay for the project.

On April 26, 1930, the date of the City-Edison contract, the Secretary also made a contract with the Metropolitan Water District of Southern California, herein called Water District. It is one of the third parties in these suits. Water District was obligated, by its contract, to take and/or pay for 36 percent of the energy generated at the dam. Water District wanted the energy to pump Colorado River water into the aqueduct which it proposed to build from the dam to the City of Los Angeles. City and Edison wanted to be certain that Water District did not use any of the energy which it bought to compete with them in the electrical utility business in their areas. The Secretary therefore inserted in Water District's contract a provision that it could use the energy only for pumping water into its proposed aqueduct. That restriction created the possibility that Water District might have to pay for a lot of energy that it could not use. Water District's contract provided, in that regard, that the Secretary might dispose of Water District's unused energy by first offering it to City and Edison and, if they did not buy it, selling it to others.

The municipalities in California which had options to take, in all, 6 percent of City's allotment exercised their options within the time specified, and the Secretary executed contracts with them in 1931. In 1936, before the dam was completed, the State of Nevada chose to take a part of the 18 percent on which it had an option, and the Secretary made a contract with it.

Water District's obligation to begin to take and/or pay for its 36 percent was to become effective when two billion kilowatt hours of energy per annum became available. When that time approached in 1937, Water District advised the Secretary that there would be surplus energy available for resale and that that condition would exist until the end of 1954. The Secretary advised City and Edison that the surplus energy was available, but they did not exercise their options to take it. The plaintiffs negotiated with the Secretary and with Water District, which would be the beneficiary of the resale contracts if made. Ten-year contracts were at first considered, but the plaintiff Citizens thought this was too short a period for it to recover the investment which it would have to make in building a transmission line from the dam to Kingman, Arizona, in order to use the power from the dam. It was then decided that the contracts should run to December 31, 1954, and they were so written. The contracts bound the plaintiffs to take and pay for only a small proportion of the energy which they had the right to take and pay for at their option.

The parties proceeded according to the contracts, and the plaintiffs received the part that they were entitled to, and chose to take, of Water District's surplus. On May 31, 1945, the Secretary made a contract with City and Edison, among others, which, the defendant says, conveyed to those contractors all of Water District's unused energy, including that which the plaintiffs were getting under their contracts, but, as to that latter amount, the sale not becoming effective until the end of the plaintiffs' contracts on December 31, 1954.

The plaintiffs, when the termination dates of their contracts approached, applied to the Secretary for renewals of their contracts. These applications were rejected, and the plaintiffs have received no electrical energy under their contracts since shortly after the date of expiration of their contracts. They claim to have been heavily damaged by the Secretary's refusal to renew their contracts, and sue here for those damages. They base their claim upon section 5 (b) of the Boulder Canyon Project Act which says:

> The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal

> thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

The plaintiffs say, correctly, that they were the holders of contracts for electrical energy, and were not in default under their contracts. Therefore, they say, the statute applied to them. The Government says that the plaintiffs read the statute too literally, and thereby miss its meaning. The Government says that statute intended to grant the renewal privilege only to those who, in effect, underwrote the project, by binding themselves to take and/or pay for electricity from the project at a time when such promises were a condition precedent to the appropriation of money for and the building of the project. It says that entities like the plaintiffs, who made contracts only for surplus energy available for resale, and whose contracts were for relatively short periods, were not intended to be covered by the renewal provision.

The plaintiffs find flaws in the Government's "underwriters" argument. They point out that although Water District made its contract, on the same day that City and Edison made theirs, to take and/or pay for 36 percent of the energy produced, Water District at that time was a new corporation, not yet financed, and the Secretary, in reporting to Congress that sufficient revenues were assured by contracts, did not include Water District's contract as an asset. They point out that the several municipalities in Southern California which had what were, in effect, options to take a part of the energy contracted for by City, were not underwriters of the project, because before they made their contracts, City had already obligated itself to pay for the energy which they later contracted for. Yet their contracts, when made, contained express renewal provisions. The same seems to have been true of contracts later made by the Secretary with the States of Arizona and Nevada.

If there is any valid distinction between the contracts of the plaintiffs and those of other entities whose contracts did give them renewal rights, it would seem to be that the plaintiffs' contracts covered only surplus energy, disposed of by the Secretary because the one who had contracted to pay for it had no use for it. Is this difference sufficient to deprive these contracts of the renewal privilege written into section 5 (b) of the Project Act?

The plaintiffs' contracts contained no provision for renewal. When Water District advised the Secretary that it would have surplus energy for disposal, it said that that would be true until the end of 1954. When the plaintiffs applied to the Secretary in 1937 for some of this surplus, they apparently had no thought of any right of renewal. They say, and apparently correctly, that the information which they had, indicated that the subject matter of their proposed contracts, i. e., surplus energy in Water District's allotment, would not exist after 1954. If the failure of the plaintiffs to insist on, or even think about, a right of renewal were urged, which it is not, as a waiver of their statutory rights under section 5 (b), the circumstances might well rebut any inference of an intent to waive.

By the year 1945, Water District had apparently decided that it would have surplus energy for all the rest of the term of its 50-year contract. The situation was acute at that time because a defense plant which had been taking and paying for a large amount of Water District's surplus energy, had closed down. By that time, City and Edison were willing to agree to take Water District's surplus energy, which they had not been willing to do in 1937. So the 1945 contract was made. As we have said, the Government says that that contract intended to include, after 1954, the energy that the plaintiffs had been getting. The plaintiffs say that the 1945 contract did not include the energy which they would continue to be entitled to if their contracts were renewed.

The question of what was intended by the 1945 contract has caused great concern to the Government, of course, since if it did include the energy which the plaintiffs had been getting, and if the plaintiffs had a statutory right to renewal, the Government was in the position of having

sold the same thing to different parties. But we think that the intention of the Government and the third parties, when they made the 1945 contract, is not conclusive, and indeed is scarcely relevant, so far as the plaintiffs are concerned. We do not, therefore, undertake to determine the intent of the 1945 contract. We note that the Government's officials had great difficulty in making up their minds as to its intent.

The plaintiffs say that the only authority which the Secretary had for the sale of electrical energy was given him in section 5 of the Project Act; that section 5 says that in making contracts for the sale of energy, section 5 (b) *inter alia*, shall govern; that section 5 (b) is the renewal privilege section; that in several places in the plaintiffs' contracts there were statements that the contracts were made pursuant to the Project Act. They urge, therefore, that they are entitled to the benefits of the statute. They further say that the equity of the statute providing for the renewal privilege makes it applicable to them. It was intended to protect those who had invested in facilities to use or distribute electricity from the dam, and customers who had become dependent upon the continued flow of that electricity. The plaintiffs say, and it would seem to be true, that these facts existed in their situations.

The Government points to the fact that the plaintiff Citizens represented to the Arizona Corporation Commission that it should be allowed to write off its investment in facilities to transmit energy from the dam during the 15-year period of its contract, and says that this shows that that plaintiff did not count on a renewal privilege. We have already discussed the reasons why the plaintiffs may not have thought that there would be a renewal of their contracts.

The applications of the plaintiffs for renewal were rejected by the Secretary in 1952. They persisted in their applications, and on March 2, 1954, the Secretary offered them, in writing, extensions of their contracts to May 31, 1987. They accepted these offers in writing, but the Secretary ultimately refused to execute formal documents of renewal, and they have received no electrical energy since early in 1955. The plaintiff Citizens bases its claim,

in the alternative, upon the renewal of its contract which, it says, was accomplished by the correspondence just referred to. In view of our conclusion upon the whole case, we do not decide this question.

The Government argues that the Secretary, in his dealings with the plaintiffs, was not acting for the United States, but for Water District. It is true that the primary benefit of the sale of Water District's unused energy inured to Water District, because the price received for it was credited to Water District's account. The contract with Water District might have provided that it could market its own unused energy, so long as it did not send it to the area where it would compete with City and Edison. But the Government did not choose to have other persons selling Hoover Dam power at wholesale. Its contract with Water District carefully provided that the Government, through the Secretary, would be the one to do the selling, if it was done. The Secretary was not acting as an agent of Water District. He was acting for the United States, and was carrying out its policy of keeping the sale of power under its control. He was also furthering the interest of the United States in keeping Water District from being overwhelmed by its obligation to pay for power for which it had no use, and thereby, possibly, being disabled from carrying out its contract with the United States.

There is an apparent inconsistency in the position of the plaintiffs, in that they do not claim that their rights, under their renewals, would be as extensive as their rights under their original contracts. It will be remembered that their contracts gave them what were, in effect, options to take specified amounts of electricity, but only bound them to take and pay for much smaller amounts. Water District was willing, in 1937, to permit the Secretary to so contract because it was certain that there would be sufficient surpluses, until the end of 1954, to satisfy those contracts. But the contracts certainly contemplated that if Water District had no surplus after 1954, there would be nothing to sell as surplus to anyone. And they certainly would have contemplated, if it had occurred to the parties, that no extension of the contracts should deprive Water District of electricity which it needed for its own purposes. The plaintiffs claim only the rights

to renewals which would have given them such electricity, if any, as was surplus to Water District's needs after 1954, and was within the amounts set in their original contracts.

Our conclusion is that the plaintiffs were entitled, under the statute, to renewals of their contracts with the limitations which they concede, and that the Government violated their statutory rights when it denied them renewals and refused to give them the electrical energy to which renewals of their contracts would have entitled them.

The plaintiffs are entitled to recover, and judgment will be entered to that effect. The amounts of the judgments will be determined in further proceedings under Rule 38 (c).

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

APPENDIX C

Order Overruling Motions for Rehearing

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this fifth day of June, 1957, that said motions be and the same are overruled as follows:

* * * * * * * * * *

364-55 Citizens Utilities Company

381-55 California-Pacific Utilities Company

Defendant's motion and the motions by the third parties, City of Los Angeles and The Metropolitan Water District of Southern California.

BY THE COURT
/s/ MARVIN JONES
Marvin Jones
Chief Judge.

APPENDIX D

Order by Mr. Justice Harlan Extending Time in Which to File Petition for Certiorari

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957

THE UNITED STATES
CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES, *Petitioners*

vs.

CITIZENS UTILITIES COMPANY AND CALIFORNIA-PACIFIC UTILITIES COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for the City of Los Angeles,

It is ordered that in so far as the City of Los Angeles has the right or standing to petition for writ of certiorari in the above-entitled cause, the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1957.

(S) John M. Harlan
Associate Justice of the Supreme Court of the United States.

Dated this twenty-ninth day of August, 1957.